No. 15-5238

Supreme Court, U.S.
FILED
DEC 23 2015
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# In The Supreme Court of the United States

LESTER RAY NICHOLS,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## JOINT APPENDIX

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**Petition For Writ of Certiorari Filed July 14, 2015**
**Certiorari Granted November 6, 2015**

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UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

(WICHITA)

Criminal Docket for Case No. 6:13-cr-10106-JTM-1

UNITED STATES

V.

LESTER RAY NICHOLS

RELEVANT DOCKET ENTRIES

| DATE FILED | NUMBER | DOCKET TEXT |
|---|---|---|
| 6/19/2013 | 1 | INDICTMENT as to Lester Ray Nichols (1) count(s) 1. (aa) (Entered: 06/20/2013) |
| 10/15/2013 | 13 | MOTION to Dismiss Indictment and Brief by Lester Ray Nichols. (Henry, Timothy) (Entered: 10/15/2013) |
| 10/29/2013 | 17 | RESPONSE TO MOTION by USA as to Lester Ray Nichols re 13 MOTION to Dismiss Indictment and Brief (Hart, Jason) (Entered: 10/29/2013) |
| 11/04/2013 | 18 | MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: MOTION HEARING as to Lester Ray Nichols held on 11/4/2013 re 13 MOTION to Dismiss Indictment and Brief |

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| | | filed by Lester Ray Nichols. The court took the matter under advisement. (Court Reporter Jana McKinney.) This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/04/2013) |
| 11/12/2013 | 19 | NOTICE OF INTENT TO CHANGE PLEA and NOTICE OF HEARING. The defendant Lester Ray Nichols has notified the court on 11/12/13 that he intends to change his plea. The time from this notice until the change of plea hearing (including any continuances) is excludable time for speedy trial purposes. (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) Change of Plea Hearing set for 11/13/2013 at 4:00 PM in Courtroom 238 JTM) before District Judge J. Thomas Marten. (mss) (Entered: 11/12/2013) |
| 11/12/2013 | 20 | MEMORANDUM AND ORDER denying 13 Motion to Dismiss Indictment as to Lester Ray Nichols (1). Signed by District Judge J. Thomas Marten on 11/10/2013. (mss) (Entered: 11/12/2013) |

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| 11/13/2013 | 21 | MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: CHANGE OF PLEA HEARING as to Lester Ray Nichols held on 11/13/2013. Defendant entered a plea of guilty to Count 1 of the Indictment. Sentencing set for 2/3/2014 at 10:00 AM in Courtroom 238 JTM) before District Judge J. Thomas Marten. (Court Reporter Jana McKinney.) This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 11/13/2013) |
| 11/13/2013 | 23 | PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA as to Lester Ray Nichols (1): Count 1. Signed by District Judge J. Thomas Marten on 11/13/2013. (smg) (Entered: 11/15/2013) |
| 11/13/2013 | 24 | PLEA AGREEMENT as to Lester Ray Nichols re 23 Petition and Order to Enter Plea of Guilty. (smg) (Entered: 11/15/2013) |
| 2/12/2014 | 28 | MINUTE ENTRY for proceedings held before District Judge J. Thomas Marten: SENTENCING |

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| | | HEARING held on 2/12/2014 as to defendant Lester Ray Nichols. (Court Reporter Jana McKinney.) (This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (mss) (Entered: 02/12/2014) |
| 2/13/2014 | 29 | JUDGMENT as to Lester Ray Nichols (1): Count 1 = 10 Months Imprisonment; 5 Years Supervised Release; $100 Assessment. Signed by District Judge J. Thomas Marten on 2/13/2014. (aa) (Entered: 02/13/2014) |
| 2/25/2014 | 31 | NOTICE OF APPEAL TO 10CCA as to defendant Lester Ray Nichols re 29 Judgment (Henry, Timothy) (Entered: 02/25/2014) |
| 4/23/2014 | 38 | TRANSCRIPT of Motion Hearing held November 4, 2013 as to Lester Ray Nichols before Judge J. Thomas Marten, Court Reporter Jana McKinney, 316-315-4314, jana_mckinney@ksd.uscourts.gov. Transcript purchased by: Mr. Timothy Henry. |
| | | NOTICE RE REDACTION OF TRANSCRIPTS: Within 7 calendar days of this filing, each party shall inform the |

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| | | Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal data identifiers from the electronic transcript of the court proceeding. The policy is located on our website at www.ksd.uscourts.gov. Please read this policy carefully. If no Notice of Intent to Redact is filed within the allotted time, this transcript will be made electronically available on the date set forth below.<br><br>Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Release of Transcript Restriction set for 7/22/2014. (jlh) (Entered: 04/23/2014) |
| 7/29/2014 | 42 | AMENDED JUDGMENT as to Lester Ray Nichols (1), Count(s) 1, AMENDED JUDGMENT: No Change to Sentence. Signed by Chief Judge J. Thomas Marten on 07/29/2014. (aa) (Entered: 07/29/2014) |

GENERAL DOCKET

TENTH CIRCUIT COURT OF APPEALS

Court of Appeals Docket # 14-3041

UNITED STATES

V.

LESTER RAY NICHOLS

Appeal From: District of Kansas

Fee Status: In Forma Pauperis

Docketed: 02/26/2014

Termed: 04/23/2015

| DATE FILED | NUMBER | DOCKET TEXT |
|---|---|---|
| 2/26/2014 | 1 | [10152468] Criminal case docketed. Preliminary record filed. DATE RECEIVED: 02/26/2014. Docketing statement, designation of record, transcript order form and notice of appearance due on 03/12/2014 for Lester Ray Nichols; notice of appearance due on 3/12/14 for United States of America. [14-3041] |
| 4/25/2014 | 12 | [10170300] Record on appeal filed. No. of Volumes: 3, Comments: Volume 1: Pleadings. Volume 2: PreSentence Report (SEALED). Volume 3: Transcript. Appellant's brief |

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| | | due on 06/04/2014 for Lester Ray Nichols. [14-3041] |
| 7/3/2014 | 16 | [10188638] Appellant/ Petitioner's brief filed by Mr. Lester Ray Nichols. 8 paper copies to be provided to the court. Served on 07/03/2014 by US mail, email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] TJH |
| 8/4/2014 | 18 | [10195947] Appellee/ Respondent's brief filed by United States of America. 7 paper copies to be provided to the court. Served on: 08/04/2014. Manner of service: email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] JAB |
| 8/15/2014 | 20 | [10198926] Appellant/ Petitioner's reply brief filed by Mr. Lester Ray Nichols. 8 paper copies to be provided to the court. Served on 08/15/2014. Manner of Service: email, US mail. This pleading complies with all required (privacy, paper copy and |

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| | | virus) certifications: Yes. [14-3041] TJH |
| 11/18/2014 | 25 | [10225233] Case argued by Timothy Henry for Appellant and by James Brown for the Appellee; Submitted to Judges McHugh, McKay and Baldock. [14-3041] |
| 12/19/2014 | 26 | [10225677] Supplemental authority filed by Mr. Lester Ray Nichols. Served on 11/19/2014. Manner of Service: US mail, email. [14-3041] TJH |
| 12/30/2014 | 27 | [10236235] Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges McHugh (authoring), McKay (concurring) and Baldock. Mandate to issue. [14-3041] |
| 12/30/2014 | 28 | [10236238] Judgment for opinion filed. [14-3041] |
| 1/13/2015 | 29 | [10239606] Petition for rehearing en banc filed by Mr. Lester Ray Nichols. Original and 18 copies. Served on 01/13/2015. Manner of Service: US mail, email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] TJH |

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| 1/16/2015 | 31 | [10240477] Order filed by Judges McHugh, McKay and Baldock – Appellee shall file a response to appellant's petition for rehearing and petition for rehearing en banc. Response due on 01/30/2015 for United States of America. Served on 01/16/2015. [14-3041] |
| 1/27/2015 | 32 | [10243141] Response filed by United States of America to Appellant's Petition for Rehearing En Banc. Served on 01/27/2015. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [14-3041] JAB |
| 4/15/2015 | 33 | [10264092] Order filed by Judges Briscoe, Kelly, Lucero (dissenting), Hartz, Tymkovich, Gorsuch (dissenting), Holmes, Matheson, Bacharach, Phillips, McHugh and Moritz. The implicit request for panel rehearing contained in appellant's petition for rehearing en banc is denied by a majority of the original panel members. The petition for rehearing en banc was transmitted to all judges in |

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| | | regular active service, a poll was called, and a majority voted to deny the petition. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition. [14-3041] |
| 4/15/2015 | 34 | [10264094] Published order filed denying petition for rehearing and for rehearing en banc by Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Holmes, Matheson, Bacharach, Phillips, McHugh and Moritz. Please see previous docket entry. [14-3041] |
| 4/23/2015 | 35 | [10266237] Mandate issued. [14-3041] |

UNITED STATES DISTRICT COURT

District of Kansas

(Wichita Docket)

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.** **CASE NO. 13-10106-01-JTM**

**LESTER RAY NICHOLS,**

**Defendant.**

# INDICTMENT

(Filed Jun. 19, 2013)

**THE GRAND JURY CHARGES:**

## COUNT ONE

## 18 U.S.C. § 2250(a)
## (FAILURE TO REGISTER)

## COUNT 1

On or about November 9, 2012, in the District of Kansas and elsewhere,

**LESTER RAY NICHOLS,**

the defendant, an individual required to register under the Sex Offender Registration and Notification Act after conviction for Interstate Travel to Engage in Sex with a Minor in United States District Court (Kansas) case number 03CR10127, knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act, in

violation of Title 18 United States Code Section 2250(a).

**A TRUE BILL**

June 19, 2013
DATE

s/Foreperson
FOREPERSON OF THE GRAND JURY

s/Barry R. Grissom
BARRY R. GRISSOM
United States Attorney
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Ks. S. Ct. No. 10866
Barry.Grissom@usdoj.gov

**It is requested that the trial be held in Wichita, KS**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | |
| vs. | ) | Case No. 13-10106-01 JTM |
| LESTER RAY NICHOLS, Defendant. | ) | |

**MOTION TO DISMISS AND BRIEF**

(Filed Oct. 15, 2013)

COMES NOW the defendant, Lester Ray Nichols, by and through his attorney, Timothy J. Henry, Assistant Federal Defender for the District of Kansas, and moves this Court to dismiss the one-count indictment as 1) the facts of this case fail to support an offense that is subject to the SORNA statute as alleged therein, and 2) the discretion statutorily delegated to the Attorney General to declare SORNA applicable to offenders convicted of sex crimes prior to SORNA's enactment date of July 26, 2006, violates the non-delegation doctrine of Article I, § 1 of the United States Constitution. On behalf of this Motion, defense counsel states as follows:

Defendant Nichols is charged in a one-count indictment with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in

violation of 18 U.S.C. § 2250(a). Nichols underlying sex offense was a federal case cited in the indictment as case # 03 CR 10127. In the first part of this Motion to Dismiss, it is the defense position that such registration is not required when one leaves the specifically defined "jurisdiction" that is subject to this legislation, and now "resides" in a foreign country that is not a "jurisdiction involved" for purposes of SORNA.

The facts pertinent to this motion are not materially in dispute. First, the defendant was under federal supervision in the District of Kansas in 2012, and had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He last registered in early October, 2012, and was not required to renew that registration until early January, 2013. In early November, 2012, the defendant boarded a plane from Kansas City International Airport to Manila, Philippines. He was ultimately arrested for the present offense on December 26, 2012, at a hotel in Manila by State Department authorities. Nichols was held in custody and then deported by Philippine authorities by plane to Los Angeles, California, where he was taken into custody by the U.S. Marshal Service and transported to Kansas to face the present charge.

The first element of 18 U.S.C. § 2250(a) states, "Whoever – (1) is required to register under the Sex Offender Registration and Notification Act; . . . " Chapter 151 of Title 42 then defines what these terms mean. *See* 42 U.S.C. § 16911 *et seq.* Section 16913 is

entitled "Registry requirements for sex offenders." It states:

> **(a) In general**
>
> A sex offender shall register, and keep the registration current, **in each jurisdiction where the offender resides**, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

42 U.S.C. § 16913(a).

The term "jurisdiction" is specifically defined in 42 U.S.C. § 16911(10):

> The term "jurisdiction" means any of the following:
>
> **(A)** A State.
>
> **(B)** The District of Columbia.
>
> **(C)** The Commonwealth of Puerto Rico.
>
> **(D)** Guam.
>
> **(E)** American Samoa.
>
> **(F)** The Northern Mariana Islands.
>
> **(G)** The United States Virgin Islands.

> **(H)** To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10).

"The term 'resides' means, with respect to an individual, the location of the individuals home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, pertinent to this motion, 42 U.S.C. § 16928 states:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

42 U.S.C. § 16928.

The Tenth Circuit addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). First, it acknowledged that "SORNA defines 'jurisdiction' to include U.S. states and territories but not foreign nations." 664 F.3d at 800, citing § 16911(10). It then went on to hold that one's "residence" and where one "resides" "are *two different concepts*." *Id.* at 800 (emphasis by Court). Defense counsel respectfully

disagrees and adopts the reasoning in the dissenting opinion in *Murphy*, as well as that contained in the Eighth Circuit's recent decision in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

The Tenth Circuit's majority decision may carry the day with this Court, but it clearly does not carry its legal water. The term "resides" is specifically defined in the statute, yet abandoned by the majority in *Murphy*. *See*, 664 F.3d at 806 (J. Lucero, dissenting). Canons of statutory construction require we use the definition specifically defined by Congress where it is given. *Id.* quoting *Hackwell v. United States*, 491 F.3d 1229, 1240 (10th Cir. 2007).

Moreover, "resides" as defined at 42 U.S.C. § 16911(13) and used in 42 U.S.C. § 16913(a) is in the present tense. The term being selectively defined is not "resided" but "resides." When, as here and in *Murphy* and *Lunsford*, a person abandons his residence, turns in his keys and informs his landlord he is terminating his lease, and moves to a foreign country, he no longer has "residence" in a "jurisdiction involved." "Resides" is "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). Here, Mr. Nichols flew to the Philippines without any intent to return. In other words, Kansas was no longer a "jurisdiction involved" requiring updating this change of residence, because "jurisdiction" is where the offender "resides." Kansas was no longer where Mr. Nichols resides.

Finally, Congress saw fit to include a separate statute that requires the Attorney General to "establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter[,]" *See* 42 U.S.C. § 16928. Thus, Congress was aware that it was not exercising it's [sic] extraterritorial jurisdiction when implementing SORNA. The Eighth Circuit recognized this.

> But Congress did not give SORNA extraterritorial effect, *see* 42 U.S.C. § 16911(10), and when a sex offender leaves the country, he no longer poses an immediate threat to the safety of children in the United States. The government asserts no policy interest under SORNA in monitoring the offender's subsequent movements *among* foreign jurisdictions. *See* National Guidelines, 73 Fed. Reg. At 38,066 ("A sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions and hence may not be subject to any enforceable registration requirement under U.S. law unless and until he or she returns to the United States.").

*Lunsford*, 725 F.3d at 863 (emphasis by Court).

* * *

Respectfully submitted,

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[Certificate Of Service Omitted]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | **Case No. 13-10106-01-JTM** |
| **VS.** | ) | |
| **LESTER RAY NICHOLS,** | ) | |
| **Defendant.** | ) | |

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO DISMISS (DOC. 13)**

(Filed Oct. 29, 2013)

The defendant's Motion to Dismiss advances two separate arguments. For his first argument, the defendant contends that the court should ignore controlling 10th Circuit precedent. For his second argument, the defendant requests the Court accept an argument that has been rejected by every circuit that has considered it. The United States submits that the Court should deny the defendant's motion.

## FACTS

The Government does not dispute the defendant's recitation of facts, as set forth in the third paragraph of his motion (Doc. 13). The Government would add that the defendant purchased a round trip ticket. For his out-bound air-travel, the defendant flew from

Kansas City, Missouri (MCI) to Detroit, Michigan (DTW) on November 9, 2012. The defendant had an approximately 2 hour layover in Detroit before flying on to Manila, Phillipines (MNL), with a schedule arrival time of 12:05am on November 11, 2012. The defendant's scheduled return ticket was for December 13, 2012, with travel through New York City (JFK) to a final destination of Kansas City, Missouri.

**The defendant's argument is contrary to prevailing 10th Circuit precedent**

For his first argument, the defendant acknowledges that he is advancing an argument that is contrary to prevailing 10th Circuit law, specifically *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the Tenth Circuit was presented with an appeal from a SORNA offender who claimed he could not be prosecuted in Utah for failing to update his registration in Utah after he left the state and moved to a foreign jurisdiction (Belize). *Id.* Briefly stated, the defendant asserted he had no obligation to update his registration after he left the state, because he no longer resided in a covered jurisdiction. *Id.* at 800. In affirming the defendant's conviction, the Tenth Circuit explained:

> "First, the statutory language naturally supports the conclusion that **abandoning one's living place constitutes a change in residence under SORNA**. When someone changes residences – whether by leaving his home, moving into a new dwelling, becoming

> homeless, or other means – he has a reporting obligation."

*Id.* at 801.

> "The permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted. Moreover, this statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state."

*Id.* at 802-03.

> "A second conclusion also follows from the statutory language. **When an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved. Even if a sex offender plans on leaving a state permanently, his reporting obligation to a jurisdiction involved remains.** Put differently, because the issue of identifying a jurisdiction involved is a different determination than the issue of whether a reporting obligation has arisen, the intentional abandonment of a home does not in itself change the 'jurisdiction where the offender resides,' so long as the offender was still a resident of the state when the abandonment occurred."

*Id.* at 803.

> "The third conclusion flowing from SORNA is that a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed. Needless to say, a legal obligation under federal law does not expire simply because one has managed to leave the country before the date on which noncompliance is punishable. So even though SORNA grants a three-day grace period, **the obligation to update a registration attaches to the sex offender as soon as a change in status occurs**."

*Id.*

In this case, the defendant makes no attempt to distinguish the *Murphy* case from the present case. Indeed, no distinction exists. The defendant nevertheless asserts that the 10th Circuit's decision in *Murphy* "does not carry its legal water." In so doing, he makes a syntactical argument regarding the term "resides." The defendant attempts to hijack the entire statutory scheme of SORNA by claiming the use of the present tense for the term "resides" means that, once the defendant no longer "resides" in Kansas in the present tense, his obligation was over and Kansas is no longer a "jurisdiction involved", as that phrase appears in the statutes.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "The most fundamental guide to statutory construction is common sense." *Salt Lake City v. Western Area Power Admin.*, 926 F.2d 974, 984 (10th Cir.1991). The Government contends that the reading given by the *Murphy* court places the word "resides" in its proper context and in its proper place in the overall statutory scheme. As noted by the *Murphy* court, "Most fundamentally, it is important to understand that a 'jurisdiction where the offender resides' and a 'residence' are two different concepts. Identifying a jurisdiction involved implicates a different inquiry than deciding whether a reporting obligation has arisen." 664 F.3d 798, 800 (10th Cir. 2011).

Indeed, the term "resides" is actually limited to "with respect to an individual" rather than "with respect to a jurisdiction" or "with respect to a jurisdiction involved." See 42 U.S.C. 16911(13). The defendant seeks to apply the definition more broadly than the definition itself would allow. Moreover, the fact that the definition of "resides" includes reference to "where the individual habitually lives" necessarily involves consideration of the historical (past tense) context of a sex offender's whereabouts, even though the word "lives" is in the present tense. Again, as noted in the *Davis* and *Western Area Power Admin.* cases, context and common sense should guide the Court.

* * *

Respectfully submitted,

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[Certificate Of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

THE UNITED STATES
OF AMERICA,

Plaintiff,

vs.

LESTER RAY NICHOLS,

Defendant.

District Court
Case Number
13-10106-01-JTM

TRANSCRIPT OF PROCEEDINGS

(Filed Apr. 23, 2014)

On the 4th day of November, 2013 at 10:03 a.m. came on to be heard in the MOTION TO DISMISS in the above-entitled and numbered cause before the HONORABLE J. THOMAS MARTEN, Judge of the United States District Court for the District of Kansas, Sitting in Wichita.

Proceedings recorded by mechanical stenography.

Transcript produced by computer.

APPEARANCES

The Plaintiff appeared by and through:
Mr. Jason Hart
Assistant United States Attorney
301 N. Main, Suite 1200
Wichita, Kansas 67202

The Defendant appeared in person, by and through:
Mr. Timothy Henry
Assistant Federal Public Defender
301 N. Main
Suite 850
Wichita, KS 67202

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[3] THE COURT: Good morning. This is the United States District Court for the District of Kansas, Case Number 13-10106-01, United States of America versus Lester Ray Nichols.

You can keep your seats, but if you would note your appearances, please.

MR. HART: Thank you, Your Honor. The government appears by and through Jason Hart, Assistant United States Attorney.

THE COURT: Thank you, Mr. Hart.

MR. HENRY: Defendant appears in person, through counsel, Timothy Henry, Assistant Federal Defender.

THE COURT: Thank you, Mr. Henry.

Well, this matter originally was set up to – for the purpose of hearing a couple of motions: One to dismiss, and one to suppress.

I understand that there, apparently, are materials or other evidence that are still in the Philippines and not available to us as a result of time differences and perhaps some other issues today and the parties are willing to put off the suppression motion until shortly before the trial begins.

Is that correct, Mr. Hart?

MR. HART: That is correct, Your Honor.

[4] THE COURT: Mr. Henry?

MR. HENRY: Yes, Your Honor, that is correct.

THE COURT: So, what we're dealing with here today then is the motion to dismiss. The gist of the argument being that the Sex Offender Registration and Notification Act does not apply to Mr. Nichols under the circumstances of this case. My understanding is that because he lives in the Philippines, apparently, resides there, that he was not required to update his registration information here in the United States, and there are several grounds which have been asserted in support of that motion.

The only thing I would say at the outset is that you are facing, Mr. Henry, on behalf of Mr. Nichols, an uphill climb in that regard given the state of authority which I have reviewed but I am here to

hear argument in behalf of your position, so with that, you may proceed, Mr. Henry.

MR. HENRY: Thank you, Your Honor.

And as the government's motion in response to my motion to dismiss acknowledged, a lot of the facts here are not being – are not in dispute. The government did point out that the plane ticket itinerary that was applicable here was a situation where my client, I believe the evidence is, is that on [5] the day that he flies out, or the day before, something like that, he abandons his residence in Kansas, drops off the key to his apartment to the landlord and goes to KCI (sic), flies out through Detroit, and then arrives in Manila, so there is approximately probably something like 20 hours total on the flight. He gets to Manila, and that is not a jurisdiction that is listed in the statute, the SORNA statute of a jurisdiction involved.

I would also point out that – and the government brings this in their response, is that the return flight on this roundtrip ticket was supposed to have occurred on December 13th of 2013 and or December 12th and, obviously, my client is still in Manila on the 26th of December and is arrested and, therefore, I would submit that there was never – there was an abandonment of his apartment; no intent to return.

The – but he had been registered for the three-month incremental period that Kansas requires. They require every three months. In early October he had reregistered for and was required to reregister with the state until early in January and, again, then

there is this three-day window when somebody changes residences that they're – under Kansas law, I think that is essentially the SORNA three-day period that the [6] government references, is that that three-day period, obviously, had not expired by the time he hit the – the Manila airport in the Philippines.

The – so the issue I think is, is there a reporting obligation when somebody goes and intends to live outside the U.S. jurisdiction, and the jurisdictions that are listed in Section 1691 – excuse me, 16911 of Title 42. And it – it wasn't brought up in the *Murphy* case and it wasn't brought up in the – the – I want to say *Lunsford* case from the Eight Circuit but the – there is a later statute in – and, again, the government argues the – the Canon of Statutory Construction regarding reading these statutes in context in their entirety and yet in their entirety, we see at 42 U.S.C. Section 16928 a separate statute within the SORNA law that says that when somebody does go outside the U.S. jurisdictions, there is to be put in place by the Department of Justice a notification system for when they come back in.

And it is clear from, I would submit from *Murphy*, as well as the Eighth Circuit's case, that Congress chose not to exercise their extraterritorial jurisdictional powers. If they have jurisdiction beyond our borders, they chose not to do that and they specifically had a statute to set up a system in place [7] for when they do come back in to our jurisdiction. And that was never raised in those earlier cases but I think the – and, again, I – I implore the Court when

the government says that – that, you know, Canons of Statutory Construction show what is – or ask the Court to, um, to abide by what was the intent of Congress, well, I am convinced that the – what Congress set forth was a fairly clear definition of "resides" and the Philippines would not be included in that definition because it's not a jurisdiction that is permitted under the statute.

And what I found interesting is, is that it really is the majority's decision or the majority's position in *Murphy*, because *Murphy* did have a dissent, it seems like the majority's opinion really goes out of the way, I mean, they – they have to jump through a lot of hoops to try to make their arguments sell. And, again, I can understand that, that this is a law that, you know, defendants are not particularly looked at kindly and but what we have is, and I think it was Judge Tymkovich, really went out of his way to make – to split hairs to say that, well, "resides" and "residence" are two different terms and, therefore, we can go ahead and apply two different definitions to them and I would submit that the clear and the shorter [8] and crisper argument here is what the dissent said, and what the Eighth Circuit said, is that just look at the clear language of the statute, and – and that's what Kansas statutory construction asked us to do. When Congress specifically defines something, you don't go outside of the statute to try to give it a different definition, and – and that's what we have here.

We have the majority in *Murphy* really closing up a huge loophole in the statute but courts are not

supposed to legislate. Courts are supposed to interpret, and – and in doing so, it really took a, you know, quite a bit of legal gymnastics to get to that position where "resides" and "residence" don't mean the same thing and it's clear that in *Murphy* they talk about how, um, abandonment of a residence – and let me get to that quote – the government cited it, but – the permanent abandonment of an abode constitutes a change of residence regardless of whether a new residence has been formally adopted.

And what we have is that if SORNA applies to where you reside at, that is where somebody resides, and this is defined by the statute as well in 16911(13), that it is – and if abandonment of a residence is a – constitutes a change in residence, then when you are saying that this SORNA statute [9] applies to where you are presently residing at, then we're talking about the Philippines, and when that same statute three subsections earlier at Subsection (10) says, these are the jurisdictions that are covered by SORNA, and SORNA applies in the present tense and once there is an abandonment, you don't get to reach back, say historically it is also where you previously resided, it is where you are residing now, and that is why there is this extra statute layer on in SORNA that says, And when you come back in, there will be a system in place so we can put you back on the registry.

And I am just trying to think how legitimately does the U.S. Government, that is the Department of Justice, how do they legitimately exercise their

jurisdiction in foreign countries regarding this registration? And it is clear Congress intended that they didn't want to have to try to keep track of people all over the country, just keep track of people within our own country and when they come back in, we'll get them back on and we'll start watching over them.

I kind of analogize it to what the probation department or what the sentencing commission did with respect to recommending supervised release not being imposed on illegal reentry clients because they get deported. We don't want to have probation officers [10] supervising people in Mexico, or Canada, or some other foreign country because that's just wasting their resources and our governmental resources.

And I – this may be a very slanted viewpoint of how SORNA works, Your Honor, but maybe Congress when they put in that last – one of those last statutes regarding having a system set up when they come back in the country, maybe they were – there was a certain amount of encouragement that, let them fly the coop; we don't want these type of defendants in our country. If they come back in, we'll put them back on the rolls again.

But – but I think that we can't be supervising people going to Indonesia, and India, and, you know, the Antarctica, or Argentina. We just don't have those resources to try to track and keep track of everybody but when they come back in through our immigration system, we know when these people are coming back in, so we can keep a registration and then there is a

statute that the Department of Justice was to set up a system to flag these people when they come back in.

Once he's in the Philippines, the government has lost jurisdiction of him with respect to SORNA. And it would seem that in applying statutory [11] construction juris prudence, that the statute is more clearly interpreted as what is federal jurisdiction, and the Philippines aren't included in that list, and there is a list of about ten different places that fall within our federal jurisdiction and, secondly, why even have this other statute that says that we're to put in place a system that will put them back on the rolls when they come back in?

And, so, I would argue that this is the government that is making the – stretching, essentially, statutory construction to fit their position, but to go outside of the statute that Congress has specifically defined what "resides" is, and or "residence" and also what jurisdictions, they are the ones that are violating the Canons of Statutory Construction.

As far as the – the second issue that I have raised – do you want me to address them one at a time?

Do you want me to sit down now or keep going?

THE COURT: No, go right ahead, Mr. Henry.

MR. HENRY: The – the Nondelegation Doctrine may be a little bit tougher to overcome because of the circuits that have already decided this

issue where the Tenth Circuit has pretty much said it's just dicta in one of their more recent cases from previous re – they [12] essentially had to explain away one of their previous cases that seem to indicate that I was on the wrong side of this argument but they said, well, that was just dicta because we never had to reach that issue and, therefore, it has not been fully decided, except in the plain error context of the case that I cited in my motion.

But what I found in – in looking through the – the research and the government's response is, is that in the past – and of course one of the – of the major cases that did not fall in favor of using a Nondelegation Doctrine to overturn the – in *Mistretta*, the sentencing commission, the delegation by Congress to set up this quasi legislative independent body to oversee the Sentencing Reform Act and the uniformity that was intended by that act, and – and – and I think that the court may look at that and say, Well, you know, that's – that's similar to, say, Congress setting up some kind of system to try to bring uniformity to sex offender registration but what we have is, is that, I mean, sentencing courts still sentenced even with the sentencing commission guidelines and the – the – and in what we have here is a delegation not to a quasi legislative body that was, you know, set up by Congress, we have delegation [13] of SORNA to the Department of Justice.

Essentially, legislative branch isn't setting up some independent body, they're giving it directly to the executive branch and what seems to me is that

this is not as much an administrative delegation to HHS, or the government's cited the SEC regarding voting within a corporation, you know, the voting power distribution among shareholders, or the FCC overseeing licensing and broadcasters, we are talking about giving the Department of Justice the ability to decide who gets prosecuted by this law.

And so this is – this is not as much a – a – I think – because I think Congress does delegate implementation of their laws to numerous agencies with underneath the executive branch but what the – what is different here is that you are turning an administrative law regarding sex offender registration, and if it was just limited to the administrative part of registering these individuals, that doesn't effect ex post facto, and the Supreme Court has said that, then that's – that's one thing but what we have here is you have a delegation to the Department of Justice that is giving essentially criminal prosecuting authority, who gets to be prosecuted by this – this law if this administrative [14] law is violated, so whether or not we are dealing with ex post facto issues in an administrative context, I think that it is not a necessarily constitutional violation.

But when you have the delegation of when it applies criminally to people, when does SORNA apply, and – and that delegation essentially is not an administrative delegation, as in the legislature giving the Sentencing Reform Act some – some interpretation by an independent body, you're essentially giving the head prosecutor in the executive branch, the law –

the head of the law enforcement branch, the ability to decide when criminal prosecutions are going to be implemented and in that respect –

THE COURT: May I – how is that really any different from every decision when information is brought forward to a prosecutor, the prosecutor deciding, well, we're going to pursue this case or we're not going to?

I mean, I recognize what you are saying but when you cut everything else away and eliminate titles and so forth, how is it any different saying to the Attorney General, you know, you're going to decide who's going to be prosecuted under this law, than Congress passing a law and saying to the U.S. [15] Attorneys, okay, here's what the law is, now you decide whether you are going to prosecute these people or not.

When you cut everything else away, isn't that a matter of discretion with respect to the prosecutors? And, you know, that is wholly apart from the fact that it really does appear that this argument is dead in the water, according to most courts, and I recognize what you said the Tenth Circuit has said and I recognize, you know, that Scalia's statement, you know, can be pulled out and saying, you know, We're getting very close to – but how is it any different from any other kind of prosecutorial discretion? Or the Attorney General coming out with guidelines saying, We're not going to prosecute these kinds of cases?

How is it any different from the lawsuit that was brought some years ago after Congress passed the law to overturn *Miranda* and the justice department saying, we're – we're simply not going to do that? Ultimately, a suit was brought and of course the whole thing was decided on a completely different ground, but help me out here.

MR. HENRY: Well, and I – I kind of anticipated this because I do know that I have an uphill – more of an uphill battle on the second part of this motion. But I think –

[16] THE COURT: Well, I don't know, I think *Murphy* actually, notwithstanding the crack that you see in it, is pretty definitive in terms of –

MR. HENRY: But if you rule in my favor on *Murphy* then it's bound to be heard on bunk [sic], Your Honor, and we can get a definitive decision maybe.

THE COURT: Well, maybe so.

You mean you don't think a three judge decision, which binds me, by the way, it may not bind anybody else outside of our district just like the Eighth Circuit decision is good, persuasive authority for the Tenth Circuit to give to them, but I can't follow any Eighth Circuit case, when the Tenth has one that flies in the face.

MR. HENRY: And I understand the Court has to follow *Murphy* but it was a two to one decision and so there is some dissent even on the Tenth Circuit, I think.

THE COURT: Yeah.

MR. HENRY: But the – as far as the prosecutorial discretion, I think that what's happened – I mean, it's a – I think that these are apples and oranges, Your Honor, and – and let me just try to explain this.

Is that Congress would pass a law and the [17] Department of Justice, because of, say, for example, in *Lopez*, Congress went back in and put in all these, you know, statistical findings to try to keep 922(o), I think it is on the books, as far as the possession of a gun within a school zone district. But, you know, it doesn't get prosecuted because essentially Congress has said that statute is unconstitutional.

In the – I think in, for example, if certain laws are – are chosen not to be enforced more than, say, others, that is a – a kind of a – I would say the line prosecutor or even the Department of Justice telling the line prosecutors, you know, we need to put our efforts elsewhere, we only have a certain amount of limited resources here, so it is more of a ground up, more of a grassroots decision in prosecutorial discretion.

What – what we have here is almost a top down delegation of authority. It's not a – the – what I think we traditionally understand or at least I do as a – as a public defender traditionally understand is the use of prosecutorial discretion, I think what we have is essentially from Congress giving another branch the authority to decide in a macro sense, not in a micro

sense on a case by case level, or but in a macro sense, essentially, the power to decide where this is [18] to go and who it is to apply to.

I do believe that Congress thought that they were sailing too close to the wind with – or to the sail with respect to this is probably or could possibly be an ex post facto violation if we applied it to everybody. We're going to go ahead and just delegate it to the Department of Justice because they are the lawyers that do the criminal prosecutions, they should know what this is and, therefore, we're just going to go ahead and leave it up to the Department of Justice to – to, you know, figure out how to get around the ex post facto clause.

And so – so Congress I think did delegate something that is much larger from a top down, macro type of delegation than the individual decision of who to prosecute and who not to, based upon what we traditionally understand is prosecutorial discretion, so I do think that this statute does fly too close to the sail as Justice Scalia mentioned, but I understand that – that it's not a violation of ex post facto regarding the – the administrative legislative desire to bring uniformity to registration, okay, but I think that when you decide, you know, that, I mean that's – that's the administrative or the – the – the reason why this – this statute is [19] set up, but when you essentially say when it comes to criminal prosecutions who gets enforced against, then you have delegated, essentially, an end around what I think is a violation of ex post facto on the criminal side.

So I understand overall that the – the SORNA is – is as far as the registration requirements but when you give to the Department of Justice the ability to say who this law gets to apply to and who it doesn't in the fashion that Congress did, I think they've – they've overstepped that bound and maybe – I know that the use of this clause is very rare but this might be the – the – the one that is, um, the one example where actually they did violate it.

So, I would just rest then on the rest of my briefs.

I'll be glad to take any questions, Your Honor.

THE COURT: Well, Mr. Henry, you know, you keep talking about an ex post facto effect and typically as one thinks about that it is a law that makes a violation of something that was not and how are you finding an ex post facto violation here?

I mean, at the time that Mr. Nichols went in – what was that? Early 2000s, like 2003 or '04? [20] He was released in 2012. This law was in place at that time.

And are you claiming that by trying to extend it to the Philippines, that that is an ex post facto use of the statute?

MR. HENRY: The ex post facto – it goes to the second part of my motion to dismiss regarding the Nondelegation Doctrine.

As far as the Philippines goes, I think that is the jurisdictional statutory construction argument that I made in the first part.

The – the – as far as the ex post facto argument goes, I know that in the '90s we had different laws, the Jacob Wetterling law and some other laws, but as far as the present registration law that my client is being charged with under SORNA, SORNA wasn't in effect when he picked up his underlying predicate and so the – and what the –

THE COURT: Well, I think that was also true with *Hendricks* and some of the other people who were civilly committed for some period of time when they come out, if I'm remembering correct.

And I may be not, Mr. Henry.

MR. HENRY: And I may not be because *Hendricks* was the State of Kansas law –

[21] THE COURT: Yeah.

MR. HENRY: – that went to the Supreme Court, Mr. Weilert argued it and from here in Wichita and –

THE COURT: It's the one that allows people who are violent sex offenders or whatever to remain civilly committed for an indeterminate period of time.

MR. HENRY: And – and as a defense counsel, I am always concerned, even if you call it

civil, if you are keeping somebody incarcerated, it's very difficult to have that split –

THE COURT: You're not going to get any quarrel from me about that, but it's the principle that you can enact a civil commitment law that applies to people who are already in the penitentiary.

MR. HENRY: And I thought *Hendricks* was more on a due process of how you – what protections are there before you give somebody a lifetime civil commitment and maybe I – then maybe there was this ex post facto argument of *Hendricks* as well that I'm missing, and I apologize.

THE COURT: Well, I'm not sure that there was one but I think it was just assumed that – I know there was argument that how can you lock somebody up again after they've already served their time for an indeterminate period of time, which to me is kind of [22] the essence of an ex post facto effect of a statute, so all I'm wondering is how is this any different?

MR. HENRY: Well, I think the argument that might be made by criminal defense lawyer based upon the statement that you just gave is that, well, I've already been criminally charged, I've already been convicted, and I've already served my time, it is double jeopardy to send me back to prison for possibly the rest of my life. Or what is the procedure? What is the burden of proof? It should be by beyond a reasonable doubt. If you are going to put me back in jail for

the rest of my life in a civil commitment, what is that burden of proof?

And I think those were kind of the touchstones of Hendricks but the – because it was more of a process going forward, they actually had a hearing, I think Jay Greeno is the one who actually did the – did the re – the re – represented Mr. Hendricks or did the hearing that flowed out of that as far as, you know, what is the burden of proof, what rights do you have, and what is – what does a court have to find.

But, and again, I – I don't want to – I mean, I think the Court understands the issue and I am – I know that the circuits that have actually answered it on the – on the ex post facto [23] nondelegation ground have – have ruled against me but it – it is a, um, I think it is when it comes down to it, is that we have this predicate, we have a number of people that have been previously found to be sex offenders, however that definition is defined.

Congress then gives to the Department of Justice, well, you go ahead and determine whether this effects, you know, what type of offenses or how far it goes back, does it effect everyone who is on the books before the law was enacted and they just in some respects took that discretion and said it applies to everybody. Even before that.

And it just seems that when it comes to the criminal prosecution side of this, rather than the administrative regulatory side of it, it – it does seem to kind of cross that – that part that is – that there

are I think more protections in respect to a criminal prosecution versus the civil finding in *Hendricks* or that we have now under the sexually dangerous person definition in the federal system.

THE COURT: Mr. Henry, one last thing. It appears to me in looking at the definition of "jurisdiction" each of these places that are listed are either states or territories over which the United States has some kind of territorial jurisdiction or [24] whatever and to the extent that, for example, in *Murphy* I think it was Belize, wasn't it?

MR. HENRY: Yes.

THE COURT: Where a person went?

And the court I think pretty well answered the question there, although I'm going to take another look at it, obviously, but you're saying that any country in which the U.S. apparently has no territorial interest or is a state, or the District of Columbia, of course, is subject to this same interpretation that you're urging here?

MR. HENRY: Yes. I believe that Congress limited where the statute was to go.

They set up a separate statute in 16928 that says that when you come back in, we'll put you back on the rolls.

THE COURT: Well, you know, it really doesn't say when you come back in.

MR. HENRY: Well –

THE COURT: It says anyone who enters.

MR. HENRY: It looks like it's directing the Attorney General to establish and maintain a system of informing the relevant jurisdictions, that being the U.S. federal jurisdiction, about when people are entering the United States who are required to [25] register.

So I – that seemed to be that – that when you – when I look at the whole SORNA statute in context, in – in its entirety, that there is a system in place where they are – there – the registration requirements apply to those people that are in the federal jurisdictions, whether it's the Virgin Islands, Samolia, District of Columbia, Puerto Rico, or any state, and then when they are outside of there, when those ex pats come into the country we'll get them back on and, again, Canons of Statutory Construction are to imply the definitions that Congress specifically set out and that's where I think *Murphy* is – majority is in err, and I will greatly argue that, if I am given the opportunity.

THE COURT: Is – is there anything in the legislative history that would indicate that that's what Congress had intended or is this what you're divining from having reviewed the entire act and seen or at least deducing that it makes sense that this would kind of be the missing piece that fills in there?

MR. HENRY: Your Honor, I'll admit, I've read the act but I have not done a legislative history analysis and so I can not speak to that.

THE COURT: All right. Thank you, Mr. Henry, [26] I appreciate it.

All right. Mr. Hart.

MR. HART: Thank you, Your Honor.

Your Honor, I don't have very much to add beyond what I presented in my brief but on that last point related to 42 U.S.C. 16928 related to, as Mr. Henry indicated, folks that leave here and then come back, I think the Court's point about, this is actually folks that are entering the United States, the Court's reading of that I think is in line, especially when one goes back to the definition section, Section – and this is 16911 Section (5)(b) or Subsection (5)(b) relating to foreign convictions and so what this relates to is folks that are outside the United States who have a [sic] committed sex offense and when they enter the United States, that they may in certain circumstances be required to register within the relevant jurisdictions.

I'll let the court read –

THE COURT: I'm right with you.

MR. HART: So what section – and I'm just going to refer to the last two digits, what Section 28 refers to is not that we're – hey, we're letting you leave the jurisdiction and once you leave you're free to go, and we only care when you come back, that's not [27] what 28 says.

Because that's one – if that is what it does say, that would support the defendant's argument that

Congress intended that when you leave, we don't care. I don't think Congress intended for folks – for the United States to essentially export our sex offenders. What they wanted to create was a system where individuals had to notify law enforcement where they were.

And I know the language that the defense hangs their hat on is the word "resides" which is the present tense, and I think the *Murphy* court does not do a lot of gymnastics, it is – the *Murphy* court does a lot of logical analysis in the context of our statutory canon – or statutory construction canon and essentially comes down to the right place, that when Congress enacted this, "jurisdiction" means something different than what – what the defense is arguing the word "resides" means. And I think this is also found in Section 42 U.S.C.(a) Section 16914 where it talks about the information to be provided by the offender.

And in Subsection (3) of (a), it is the address of each residence at which the offender resides or will reside. And so there we have a – you're supposed to provide where you are going, where you will [28] reside, and that is important in the context of the overall statutory construction when one goes back to 16913, Subsection (c), which is keeping the registration current that a sex offender shall not later than three business days after each change of residence notify the jurisdiction involved.

And so what that talks about when it talks about a jurisdiction involved, it is the place where the

defendant or the sex offender is currently residing, as well as where they end up going and as the *Murphy* court discusses, in some cases the defendant's travel may take longer than those three business days and so he has the obligation to where he left and where he ends up. And we've even seen this in some cases relating to the travel arrangements, where an individual leaves a jurisdiction, goes through another couple of jurisdictions and arrives at another one, where venue is appropriate.

And there is – and I cannot recall the name of it, it is *Pietrantonio*, I know it was referenced in Judge Melgren's recent opinion in *United States v. Marcus Sabation Lewis* discussing similar type of issues but, ultimately, jurisdiction is – jurisdiction involved is a different analysis than where the offender resides, and that's sort of what *Murphy* gets [29] down to.

I have read the *Lunsford* case out of the Eighth Circuit. Quite frankly, I think they decided it wrong. I think their analysis sort of stopped at the syntactical, as opposed to looking at the overall context and the overall purpose of the statute.

And if you look at the *Lunsford* case and then look at what it means to keep a registration current and notifying not later than three business days after, well, if the only point in time where you are supposed to notify somebody is when you are there, there would never be any instance where you would notify them three days after.

So this whole notion of a present tense construction controls I think in the overall context of the SORNA statute, I think that is erroneous and I think the *Murphy* court decided that correctly.

I don't think I can really add anything beyond my brief on the nondelegation arguments, but if the court has any questions, I will attempt to answer them as best I'm able.

THE COURT: Well, I think you have all pretty well covered the waterfront on it and I appreciate it.

And, Mr. Henry, I appreciate your answering my questions.

[30] I am not going to decide this right this moment but I am going to take another look. I will just tell you, so there is no great mystery about it, my inclination at this point based on what I have read and the reasoning of those cases is to deny the motion to dismiss, but I am going to take a look again at the authorities and to see if there is anything else out there, particularly in the legislative history of 924 to see if the interpretation that Mr. Henry is urging on behalf of Mr. Nichols has any legs or not.

I am reading it just as I said, and as Mr. Hart had indicated, it doesn't talk about reentry, it talks about persons coming in.

There is the provision about foreign offenders and how they have to register unless it's pretty clear that they have not actually been through a system

that has something approaching due process of law on the criminal side of things so, counsel, thank you all so much.

Mr. Henry.

MR. HENRY: Your Honor, just on that last point that you – you mentioned regarding the government's argument on foreign convictions, in 16928, that statute that talks about the AG is supposed to set up and maintain a system informing relevant [31] jurisdictions about persons?

THE COURT: Right.

MR. HENRY: It says – doesn't say foreign convicted people, it says who are required to register under the subchapter.

THE COURT: That's exactly right.

MR. HENRY: And so it – I think that is a – it does not apply just to foreign convictions, I think it applies to every person who is out of the U.S. jurisdiction who comes back in, or who was someone from another citizen of another country who comes in but has that type of a conviction. And it's interesting –

THE COURT: I understand. You've already made that argument, Mr. Henry. That's the argument you're making on behalf of Mr. Nichols here and all I am saying is it doesn't say "reentering," it talks about "entering." That could be somebody I guess who left once and then comes back; that's an entry, it's not a reentry.

MR. HENRY: Yeah.

THE COURT: So, I am – you haven't waived an argument here, Mr. Henry.

MR. HENRY: Okay. Thank you.

THE COURT: You bet.

All right. Well, thank you all so much. That [32] will conclude this matter for today. (Proceedings conclude at 10:50 a.m.)

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[33] CERTIFICATE

I, Jana L. McKinney, United States Court Reporter in and for the District of Kansas, do hereby certify:

That the above and foregoing proceedings were taken by me at said time and place in stenotype;

That thereafter said proceedings were transcribed under my discretion and supervision by means of computer-aided transcription, and that the above and foregoing constitutes a full, true and correct transcript of requested proceedings;

That I am a disinterested person to the said action.

IN WITNESS WHEREOF, I hereto set my hand on this, the 23rd day of April, 2014.

s/ Jana L. McKinney
Jana L. McKinney, RPR, CRR, RMR
United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,

Plaintiff,

vs. Case No. 13-10106-JTM

Lester Ray Nichols,

Defendant.

MEMORANDUM AND ORDER

(Filed Nov. 12, 2013)

The defendant, Lester Ray Nichols, is charged with knowingly failing to register and update his registration as required by the Sex Offender Registration and Notification Act (SORNA) in violation of 18 U.S.C. § 2250(a). The matter is before the court on Nichols's motion to dismiss the charge, arguing that SORNA does not apply to him under the circumstances of his case.

In 2003, Nichols was convicted of interstate travel to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). *United States v. Nichols*, No. 03-10127-MLB (D. Kan. Dec. 17, 2003). He was sentenced to 120 months imprisonment.

Nichols was released from prison and under federal supervision in the District of Kansas in 2012. Up until that time, he had complied with both Kansas and federal authorities in keeping his sex offender registry up to date every three months. He

last registered in early October, 2012, and he was to renew his registration in early January, 2013.

However, in early November, 2012, Nichols boarded a plane from Kansas City International Airport to Manila, Philippines. On November 16, a warrant was issued to arrest Nichols for violation of his supervised release.

On December 26, 2012, law enforcement officers of the Manila Police and Philippine Bureau of Immigration arrested Nichols at a Manila hotel. After he was identified, Nichols met with an agent of the United States Department of State, Diplomatic Security Service (DSS). Nichols was held in custody and deported by plane to Los Angeles, California, where he was taken into custody by the United States Marshal Service and transported to Kansas to face the present charge.

Nichols contends that SORNA did not require him to register as a sex offender while he was in the Philippines. 42 U.S.C. § 16913(a) requires:

> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

SORNA explicitly defines "jurisdiction" as:

> (A) A State.
> (B) The District of Columbia.
> (C) The Commonwealth of Puerto Rico.
> (D) Guam.
> (E) American Samoa.
> (F) The Northern Mariana Islands.
> (G) The United States Virgin Islands.
> (H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

42 U.S.C. § 16911(10). Further, SORNA provides that "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13).

Finally, 42 U.S.C. § 16928 provides:

> The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

The defendant agues [sic] that he does not fall under SORNA because he resided in the Philippines, a foreign country. In advancing this argument, the

defendant acknowledges *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). In *Murphy*, the court held the defendant violated SORNA when he moved form [sic] his residence in Utah to Belize. It observed that

> although SORNA gives a sex offender the ability to satisfy his registration requirement in one state by updating his registration in another state, he cannot do so by registering in a foreign country, because it is not a SORNA jurisdiction. Thus, a sex offender relocating abroad must satisfy his reporting obligations in a jurisdiction involved.
>
> In sum, it is plain that the definitions in § 16911 and the registration obligation in § 16913 require a sex offender, upon changing his residence, to update his registration in a jurisdiction involved – in this case, where the offender has a home or habitually lives or works – even if he did not establish a new residence in a SORNA jurisdiction. To put it more directly, when a sex offender changes residences, jobs, or student status, a reporting obligation arises in a state where he lives, works, or is in school.

664 F.3d at 803. According to the court, the SORNA requirement that the defendant update his registration "attached when he left Bonneville, while he was still in Utah, and not when he arrived in Belize." *Id.* at 804.

Here, Nichols advances several rationales as to why *Murphy* was mistaken, including the verb tense used for "resides" under 42 U.S.C. § 16911(13), and

that the intent of Congress to limit the extraterritorial effect of SORNA is reflected in 42 U.S.C. § 16928. He also notes that similar arguments have succeeded in persuading the Eighth Circuit to reach a conclusion contrary to *Murphy* in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).

*Murphy*, however, remains controlling authority, and establishes that Nichols violated SORNA when he did not update his registration in Kansas prior to departing for Manilla. Under SORNA, "[t]he permanent abandonment of an abode constitutes a change of residence, regardless of whether a new residence has been formally adopted." *Murphy*, 664 F.3d at 802-03. While Nichols could not make a new registration in the Philippines, SORNA permitted and required notice of the change in State of Kansas. "[T]his statutory construction aligns with legislative intent, because Congress's goal in enacting SORNA was to ensure that sex offenders could not avoid registration requirements by moving out of state." *Id.*

Alternatively, Nichols argues that 42 U.S.C. § 16913(d) is unconstitutional, as the statute improperly delegates legislative power to the Attorney General to determine whether SORNA should be applied retroactively to pre-Act offenders. Again, Nichols acknowledges that there is a recent Tenth Circuit case reaching a contrary conclusion, *United States v. Rickett*, ___ Fed. Appx. ___, 2013 WL 4750781 (10th Cir. 2013). He correctly notes that in *Rickett*, the court did not directly address the issue of whether application of SORNA to pre-Act offenders

violates the non-delegation principle. In *Rickett*, the defendant had pled guilty to the offense, so the Tenth Circuit only decided that the application of SORNA was not plain error.

Plain error is "(1) error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. DeChristopher*, 695 F.3d 1082, 1091 (10th Cir.2012). In *Rickett*, the court held that the defendant's SORNA challenge failed at the second stage; since the "purported constitutional infirmity under the nondelegation doctrine is anything but plain (i.e., clear or obvious), we . . . need not reach prongs one, three, or four." 2013 WL 4750781, at *5. The court held that the defendant could not establish plain error, because under this standard "to render an alleged error 'clear' or 'obvious,' Mr. Rickett needs *controlling* Supreme Court or Tenth Circuit precedent, or a hefty weight of *controlling* authority from other circuits. *Id.* at *7 (emphasis in *Rickett*). Since the defendant could cite to only a few "concurring and dissenting opinions of several jurists who have noted a potential delegation problem with § 16913(d)'s grant of authority to the Attorney General," he did not meet this standard. *Id.*

However, while *Rickett* is not controlling here given its plain error analysis, the rest of the opinion places his argument strongly in doubt. First, the Tenth Circuit reviewed the history of the non-delegation doctrine, ultimately concluding that the doctrine was virtually dead:

To facilitate our analysis of whether any error here is "clear" or "obvious" we begin with a brief discussion of the origin and evolution of the nondelegation doctrine. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The doctrine derives from the Constitution's opening declaration that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Fidelity to the constitutional text and to the structure of government that the Constitution sets up "mandate[s] that Congress generally cannot delegate its legislative power to another Branch." *Mistretta*, 488 U.S. at 372. Congress may, however, vest "decision-making authority" in a coordinate branch so long as it provides "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)) (internal quotation marks omitted).

Between 1789 and 1935 – a period spanning 146 years of constitutional history – the Supreme Court "never struck down a challenged statute on delegation grounds." *Mistretta*, 488 U.S. at 373. Then, in 1935, the Court invalidated two statutes as

> unconstitutional delegations of legislative power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *see also* 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.").
>
> The doctrine went dormant thereafter, and the Supreme Court has since upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373; *see Whitman*, 531 U.S. at 474. Indeed, so dormant is the nondelegation doctrine that some have deemed it a "dead letter." *See* Gary Lawson, Delegation and Original Meaning, 88 VA. L.REV. 327, 329 (2002). Still, the Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining*; so the doctrine, even if dead, has never received a proper burial.

2013 WL 4750781, at *5-6.

Second, while some dissenting and concurring opinions have suggested a nondelegation doctrine challenge to the application of SORNA to pre-Act offenders, the court stressed that the decisions squarely considering the issue are "abundant," and that the "clear weight of appellate authority" rejects the argument. *Id.* at *7.

[W]e note that neither the Supreme Court nor our court has ever addressed whether § 16913(d) is an unconstitutional delegation to the Attorney General. . . . Moreover, those circuits that have considered similar non-delegation challenges to SORNA have uniformly rejected them. *See, e.g.*, *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir.2013); *United States v. Parks*, 698 F.3d 1, 7-8 (1st Cir.2012), cert. denied, ___ U.S. ___, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012); *United States v. Guzman*, 591 F.3d 83, 91-93 (2d Cir.2010); *United States v. Whaley*, 577 F.3d 254, 263-64 (5th Cir.2009); *United States v. Ambert*, 561 F.3d 1202, 1212-15 (11th Cir.2009); *see also Kuehl*, 706 F.3d at 920 ("We agree with our sister Circuits that section 16913(d) of SORNA is a valid delegation of authority because Congress provided the Attorney General with an intelligible principle to follow." (footnote omitted) (collecting cases)); *Parks*, 698 F.3d at 8 ("All other circuits that have addressed the issue [as to SORNA] have rejected the delegation objection, which modern case law tends regularly to disfavor."); *cf. United States v. Dixon*, 551 F.3d 578, 583-84 (7th Cir.2008) ("Likewise without merit is his argument that for Congress to delegate to an official of the executive branch the authority to fill out the contours of a statute violates the separation of powers. It is commonplace and constitutional for Congress to delegate to executive agencies the fleshing out of criminal statutes

> by means of regulations."), *rev'd on other grounds sub nom., Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010).

*Id.* (footnotes omitted).

Third, the Tenth Circuit in a separate case has observed that "§ 16913 – SORNA's registration provision – does not violate the . . . nondelegation doctrine. . . ." *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011).

As the court expressly noted in *Rickett*, this language in *Carel* was dicta and thus not controlling. But while *Rickett* may not be as *automatically* fatal to the defendant's second argument as *Murphy* was to his first, it points to the same result. That is, *Rickett* recognized that (1) the nondelegation doctrine is dead if not buried, (2) that "abundant authority" from other circuits "upholds SORNA in the face of nondelegation challenges," and (3) a prior panel of the Tenth Circuit rejected the argument, albeit in dicta.

Finally, it must be noted that the defendant provides small grounds for supporting his request that the court depart from the "abundant authority" and strike down the application of SORNA based upon a "dead letter" doctrine. Rather, the most the defendant does is to stress that *Rickett* is not technically controlling (Dkt. at 6-7), along with a citation to Justice Scalia's observation in dissent in *Reynolds v. United States*, 132 S.Ct. 975, 986 (2012) (Scalia, J.) (dissenting) that a construction of SORNA which

would grant the Attorney General discretion to apply the statute to pre-Act offenders "seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable."[1] Other than this single statement made in dissent, the defendant offers no authority for his second argument, and the court finds SORNA is constitutional.

IT IS ACCORDINGLY ORDERED this 10th day of November, 2013, that the defendant's Motion to Dismiss (Dkt. 13) is hereby denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

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[1] In *Reynolds*, the defendant was a pre-Act offender who challenged the application of SORNA before the Attorney General had effectively implemented any regulations pursuant to 42 U.S.C. § 16928. The Court held that "the Act's registration requirements do not apply to pre-Act offenders *until the Attorney General so specifies*." 132 S.Ct. at 984 (emphasis added). This would be yet another indication that application of SORNA to pre-Act offenders, based on the broad grant of authority under § 16928, is lawful.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

| | |
|---|---|
| **UNITED STATES OF AMERICA,** **Plaintiff,** **v.** **LESTER RAY NICHOLS,** **Defendant.** | **NO. 13-10106-01 JTM** **PETITION TO ENTER PLEA OF GUILTY AND ORDER ENTERING PLEA** **[Federal Rules of Criminal Procedure, Rules 10 and 11]** (Filed Nov. 13, 2013) |

The defendant represents to the Court:

(1) My full true name is: Lester Ray Nichols. I am 72 years of age. I have completed the 9th *grade and have obtained my GED*. I request that all proceedings against me be in my true name.

(2) I am represented by a lawyer, his name is:

*Timothy J. Henry, Assistant Federal Public Defender*.

(3) I received a copy of the Indictment[1] before being called upon to plead. I read the Indictment and have discussed it with my lawyer. I fully understand every charge made against me.

[1] "Indictment" also includes "Information."

(4) I told my lawyer all the facts and circumstances known to me about the charges made against me in the Indictment. I believe that my lawyer is fully informed on all such matters.

(5) I know that the Court must be satisfied that there is a factual basis for a plea of "GUILTY" before my plea can be accepted. I represent to the Court that I did the following acts in connection with the charges made against me in Count *1 of the Indictment: that on or about November 9, 2012, in the District of Kansas and elsewhere, I am an individual required to register under the Sex Offender Registration and Notification Act after having been convicted in U.S. District of Kansas case # 03 CR 10127, Interstate Travel to Engage in Sex with Minor, and that I abandoned my residence in Kansas and traveled to Manila, Philippines where I established my residence until I was arrested on December 26, 2012, and returned to the United States, and did not notify any law enforcement authority of this change in residence, in violation of 18 U.S.C. § 2250(a).*

(6) My lawyer has counseled and advised me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case.

(7) I know that I have the right to plead "NOT GUILTY" to any offense charged against me. If I plead "NOT GUILTY" I know the Constitution guarantees me (a) the right to a speedy and public trial by a jury; (b) at that trial, and at all stages of the

proceedings, the right to the assistance of a lawyer; (c) the right to see and hear all witnesses called to testify against me, and the right to cross-examine those witnesses; (d) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor; and (e) the right not to be compelled to incriminate myself by taking the witness stand; and if I do not take the witness stand, no inference of guilt may be drawn from such failure.

(8) I know that if I plead "GUILTY," I am thereby waiving my right to a trial, and that there will be no further trial of any kind, either before a Court or jury; and further, I realize the Court may impose the same punishment as if I had pleaded "NOT GUILTY," stood trial, and been convicted by a jury.

(9) I know that if I plead "GUILTY," the Court will ask me questions about the offense(s) to which I have pleaded, and since I will be answering these questions under oath, on the record, and in the presence of my lawyer, that my answers may later be used against me in a prosecution for perjury or false statement.

(10) My lawyer informed me that the plea of "GUILTY" could subject me to a mandatory minimum sentence of not less than 0 years (if applicable) and to a maximum punishment which, as provided by law, is 10 years to be followed by a term of supervised release of at least 5 years on (Title 21 Drug Offense) and not to exceed life, and a fine of not more than

$250,000 (which may accrue interest if not paid at time of sentencing) for the offense charged in Count 1 of the Indictment. I have also been informed that should the Court find me in violation of the supervised release term, the term could be revoked and an additional term of imprisonment not to exceed 2 years may be imposed. I have also been informed that the Court may order me to make restitution in compliance with 18 U.S.C. § 3663 and § 3664 or as a condition of supervision, if such is ordered under 18 U.S.C. § 3563, in addition to any other penalty provided by law. I further understand that if I am pleading "GUILTY" to an offense which is subject to the Sentencing Reform Act, I cannot be released on parole and, if imprisonment is ordered in my case, the sentence imposed by the Court will be the sentence I serve less any good time credit if I earn it.

(11) I know that in addition to any other penalty imposed, including any fine or restitution order, the Court is required to impose a special monetary assessment in the amount of $_____ for each count in which the offense occurred after November 13, 1984. ($50.00 for a felony, $25.00 for a misdemeanor; if the defendant is other than an individual, the assessment is $200.00 for a felony and $100.00 for a misdemeanor).

The special monetary assessment is $100.00 for each count in which the offense occurred after April 24, 1996. (Not less than $100.00 for a felony, $50.00 for a misdemeanor; if the defendant is other than an individual the assessment is not less than $400.00 for

a felony and $100.00 for a misdemeanor). I UNDERSTAND THIS SPECIAL ASSESSMENT MUST BE PAID AT THE TIME OF THE SENTENCING HEARING UNLESS THE COURT DIRECTS OTHERWISE.

(12) I understand that if my case involves drug trafficking or drug possession, the Court may deny or suspend my eligibility to receive federal benefits pursuant to 21 U.S.C. § 862, except for those specifically exempted. I understand that if this is my second or subsequent conviction for possession of a controlled substance, the Court may order me to complete drug treatment or community service as specified in the sentence as a condition for reinstatement of benefits.

(13) I know that the Court may also order, in addition to the penalty imposed, that I give reasonable notice and explanation of the conviction, in such form as the Court may approve, to the victims of the offense.

(14) I have been advised and understand that if I am not a U.S. citizen, a conviction of a criminal offense may result in deportation from the United States, exclusion from admission to the United States, and/or denial of naturalization.

(15) If I am on probation or parole in this or any other Court, I know that by pleading guilty here, my probation or parole may be revoked and I may be required to serve time in that case, which will be consecutive, that is, in addition to any sentence imposed upon me in this case.

(16) I declare that no officer or agent of any branch of government (federal, state, or local) has promised, suggested, or predicted that I will receive a lighter sentence, or probation, or any other form of leniency if I plead "GUILTY," except as follows:

*My attorney did discuss how the Sentencing Guidelines may apply in my case.*

If anyone else, including my attorney, made such a promise, suggestion, or prediction, except as noted in the previous sentence, I know that he had no authority to do so.

I know that the sentence I will receive is solely a matter within the control of the Judge. I do understand that there is no limitation on the information the Judge can consider at the time of sentencing concerning my background, character, and conduct, provided the information is reliable, 18 U.S.C. § 3661. I do understand that if I am subject to sentencing under the Sentencing Reform Act and the Sentencing Guidelines issued by the United States Sentencing Commission, a sentencing guideline range is established. The Judge will consider a sentence from within the guideline range and, if my case presents features which persuade the Judge to vary from the guideline the Judge could impose a sentence either above or below the recommended guideline range. In determining the guideline range, any variance, and the sentence to impose, the Court may take into account all relevant criminal conduct, which may include counts to which I have not pled guilty or been

convicted and take into account background characteristics, unless otherwise prohibited by law. I further understand that my background characteristics including, but not limited to, the recency and frequency of my prior criminal record, whether or not a substantial portion of my income resulted from criminal conduct, my role in the offense, victim-related circumstances, and my acceptance of the responsibility for the offense, may have a specific effect on the sentence.

I hope to receive leniency, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose. However, I respectfully request the Court to consider, in mitigation of punishment, that I have voluntarily entered a plea of guilty.

(17) I understand that a U.S. Probation Officer will be assigned to conduct a thorough presentence investigation to develop all relevant facts concerning my case unless the Court finds that there is in the record sufficient information to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553. The report of the presentence investigation shall contain the factors set forth in Rule 32. These include the classification of the offense and of the defendant under the categories established by the Sentencing Commission, the kinds of sentence available to the Court, and the sentencing range the officer believes applicable. The report shall include the history and characteristics of the defendant and

such other information required by the Court recognizing the factors set forth in paragraph (16) above.

(18) My plea of guilty is the result of my plea agreement entered into between the Government attorney, my attorney, and me.

Since my plea of guilty is the result of a plea agreement, I hereby state that the terms of said agreement are as follows:

*See attached plea agreement.*

I fully understand that the Court is not bound by the terms of the plea agreement, and may accept or reject said agreement. If the Court rejects the agreement, I also understand the Court will *not* give me the opportunity to withdraw my plea of guilty, unless the plea agreement, signed by all parties, is executed in accordance with Federal Rules of Criminal Procedure, Rule 11(c)(1)(A) or Rule 11(c)(1)(C).

(19) I believe that my lawyer has done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME.

(20) I know that the Court will not permit anyone to plead "GUILTY" who maintains he/she is innocent and, with that in mind, and because I am "GUILTY" and do not believe I am innocent, I wish to plead "GUILTY" and respectfully request the Court to

accept my plea of "GUILTY" and to have the Clerk enter my plea of "GUILTY" as follows.[2]

*Guilty to Count 1 of the Indictment.*

(21) My mind is clear, I am not under the influence of alcohol. I currently am not under a doctor's care. The only drugs, medicines or pills that I took within the past seven (7) days are:

*Rantidine and two inhalers.*

(22) I have never been confined in an institution for the treatment of mental illness. I have never been adjudicated mentally incompetent. No psychiatrist, physician, or psychologist has ever found me to be mentally ill. I know of no reason why my mental competence at the time of the commission of the alleged offense(s), or at the present time, should be questioned. (If there are any exceptions to the above statement, explain below.)

(23) I offer my plea of "GUILTY" freely and voluntarily, and further state that my plea of guilty is not the result of any force or threats against me, or of any promises made to me other than those noted in

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[2] The defendant's plea of "GUILTY" or "NOT GUILTY" to each offense should be entered in the blank spaces provided in paragraph (20). If the Indictment charges a single offense, a defendant who wishes to plead "GUILTY" should write in paragraph (20) "GUILTY as charged in the Indictment." If more than one offense is charged, the defendant may write in paragraph (20) "GUILTY as charged in Count(s) _____," "NOT GUILTY as charged in Count(s) _____"

this petition. I further offer my plea of "GUILTY" with full understanding of all the matters set forth in the Indictment and in this petition, and in the certificate of my attorney which is attached to this petition.

(24) I waive the reading of the Indictment in open court, and I request the Court to enter my plea of "GUILTY" as set forth in paragraph (20) of this petition.

(25) I swear that I have read, understood, and discussed with my attorney, each and every part of this Petition to Plead Guilty, and that the answers which appear in every part of this petition are true and correct.

Signed and Sworn to by me in open court, in the presence of my attorney, this 13th day of November, 2013.

/s/ Lester Ray Nichols
Lester Ray Nichols, Defendant

Subscribed and Sworn to before me this 13th day of *November*, 2013.

/s/ Sue Smith
(Deputy Clerk)

## CERTIFICATE OF COUNSEL

The undersigned, as lawyer and counselor for the defendant Lester Ray Nichols hereby certifies:

(1) I have read and fully explained to the defendant the allegations contained in the Indictment in this case.

(2) To the best of my knowledge and belief, the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

(3) I explained the maximum penalty for each count to the defendant.

(4) The plea of "GUILTY" offered by the defendant in paragraph (20) accords with my understanding of the facts he related to me and is consistent with my advice to the defendant.

(5) In my opinion, the defendant's waiver of reading of the Indictment in open court as provided by Rule 10 is voluntarily and understandingly made, and I recommend to the Court that the waiver be accepted.

(6) In my opinion, the plea of "GUILTY" offered by the defendant in paragraph (20) of the petition is voluntarily and understandingly made. I recommend that the Court accept the plea of "GUILTY."

(7) I have made no predictions or promises to the defendant concerning any sentence the Court may award, except as noted in the space below:

I have discussed with my client how the Sentencing Guidelines may apply in his case.

(8) I further represent to the Court that the defendant's plea of "GUILTY" is the result of a plea agreement. The terms of the agreement are set out in paragraph (18) of the petition, and I have informed the defendant that the Court is not bound by the terms of the agreement and that if the Court rejects the agreement, the Court will not give him the opportunity to withdraw his plea of "GUILTY," unless the plea agreement, signed by all parties, is executed in accordance with Federal Rules of Criminal Procedure, Rule 11(c)(1)(A) or Rule 11(c)(1)(C).

Signed by me in open court in the presence of the defendant above named and after full discussion of the contents of this certificate with the defendant, this 13th day of November, 2013.

/s/ Timothy J. Henry
Timothy J. Henry,
Assistant Federal Public Defender

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**ORDER**

I find that the plea of guilty was made by the defendant freely, voluntarily, and because he is guilty as charged, and not out of ignorance, fear, inadvertence or coercion, and with full understanding of its consequences. I further find that the defendant has

admitted the essential elements of the crime charged and is mentally competent.

IT IS THEREFORE ORDERED that the defendant's plea of "GUILTY" be accepted and entered as prayed for in the petition and as recommended in the certificate of his lawyer.

Done in open court this 13th day of November, 2013.

/s/ J. Thomas Marten
J. THOMAS MARTEN
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | |
| **Plaintiff,** | ) | |
| **VS.** | ) | **NO. 13-10106-01-JTM** |
| **LESTER RAY NICHOLS,** | ) | |
| **Defendant.** | ) | |

## PLEA AGREEMENT

(Filed Nov. 13, 2013)

The United States of America, by and through Assistant United States Attorney, Jason W. Hart, and Lester Ray Nichols, the defendant, personally and by and through defendant's counsel, Tim Henry, hereby enter into the following plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure:

1. ***Defendant's Guilty Plea.*** The defendant agrees to plead guilty to Count 1 of the Indictment charging a violation of Title 18, United States Code, § 2250, that is, Failure to Register or Update a Registration. By entering into this plea agreement, the defendant admits to knowingly committing this offense, and to being guilty of the offense. The defendant understands that the maximum sentence which may be imposed as to Count 1 of the Indictment is not more than ten (10) years of imprisonment, a $250,000 fine, not less than five (5) years and up to life

of supervised release, and a $100 mandatory special assessment.

**2. *Factual Basis for the Guilty Plea.*** The parties agree the facts constituting the offense to which the defendant is pleading guilty are as follows:

> The defendant, Lester Ray Nichols, admits that he was previously convicted in September 2003 of a violation of 18 U.S.C. 2423(b), for which he received a sentence of ten (10) years followed by five (5) years supervised release. He was also required to comply with any laws regarding sex offender registration.
>
> The defendant, Lester Ray Nichols, admits that he initially registered with the Leavenworth County (Kansas) Sheriff on December 30, 2011, and provided a current physical residence of 4715 Brewer Place, Leavenworth, Kansas. He then updated his registration on January 19, 2012, in accordance with his schedule registration requirement (because his birthday was January 24, he was required to report in the month of January, April, July, and October). In April 2012, he updated his registration to reflect a change in his current physical address, providing an address of 920 N 2nd Street, Apt. C, Leavenworth, Kansas. He reported the same address again in July 2012 and again in October 2012. His last registration reflects a current physical

residence of 920 N 2nd Street, Apt. C, Leavenworth, Kansas on October 1, 2012. For each of these registrations, he also reviewed, comprehended, and initialed the Acknowledgement of the Offender form which set forth his sex offender registration requirements, including:

> Paragraph 7, "I must register in person upon commencement, change, or termination of residence location, employment status, school attendance or other information within three days of such commencement, change or termination, to the registering law enforcement agency or agencies where last registered and provide written notice to the Kansas bureau of investigation."
>
> Paragraph 14, "If I travel outside of the United States, I will report in person to the registering law enforcement agency and provide written notice to the Kansas bureau of investigation 21 days prior to any such travel. I will provide an itinerary including, but not limited to, destination, means or transport and duration of travel."
>
> Paragraph 17, "Pursuant to Title 18, United States Code, Section 2250, if a sex offender fails to register or fails to report a change in residence,

> employment, or student status, and travels in or moves across state lines, the offender can be charged with a federal crime and punished by up to ten (10) years imprisonment."
>
> The defendant, Lester Ray Nichols, admits that, on November 9, 2012, he abandoned his residence in Kansas and traveled to Kansas City, Missouri, where he boarded a flight departing from MCI with a final destination of Manila, Philippines. Once in Manila, he established a new residence at the Boulevard Mansion Hotel. He was arrested in Manila on December 26, 2012. At no time did the defendant notify any law enforcement authority of his intent to change residence and travel to Manila, Philippines.

3. ***Application of the Sentencing Guidelines.*** The parties request that the United States Sentencing Guidelines (Guidelines) be used to calculate the applicable sentence in this case. The parties understand that the guidelines are advisory, and that correct calculation of the applicable guideline is one part of the sentencing factors that the Court shall consider pursuant to Title 18, United States Code, § 3553(a)(4)(A).

4. ***Government's Agreements.*** In return for the defendant's plea of guilty as set forth herein, the United States Attorney for the District of Kansas agrees:

a. To not file any additional charges against the defendant arising out of the facts forming the basis for the present Indictment;

b. To recommend the defendant receive a two (2) level reduction in the applicable offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility. In addition, if the defendant's offense level is 16 or greater, the United States will move at the time of sentencing for the defendant to receive an additional one (1) level reduction for acceptance of responsibility because the defendant timely notified the government of his intention to enter a plea of guilty;

c. To recommend a sentence no higher than the top of his applicable guideline range; and

d. The defendant is free to argue for departure or variance.

The government's obligation concerning its agreements listed in ¶ 4 are contingent upon the defendant's continuing manifestation of acceptance of responsibility as determined by the United States. If the defendant denies or gives conflicting statements as to his involvement, willfully obstructs or impedes the administration of justice as defined in U.S.S.G. § 3C1.1 (or willfully attempts to do so), or engages in additional criminal conduct, the United States reserves the right to request a hearing to determine if the defendant has breached this agreement.

In the event the Court finds the defendant has breached this plea agreement or otherwise failed to adhere to its terms, the United States shall not be bound by this paragraph and may pursue any additional charges arising from the criminal activity under investigation as well as any perjury, false statement, or obstruction of justice charges which may have occurred. The defendant understands and agrees that in the event the defendant violates this plea agreement, all statements made by the defendant subsequent to the execution of this plea agreement, any testimony given by defendant before a grand jury or any tribunal or any leads from such statements or testimony shall be admissible against the defendant in any and all criminal proceedings. The defendant waives any rights which might be asserted under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, or any other federal rule that pertains to the admissibility of any statements made by the defendant subsequent to this plea agreement.

**5.** ***Sentence to be Determined by the Court.*** The defendant understands that the sentence to be imposed will be determined solely by the United States District Judge. The United States cannot and has not made any promise or representation as to what sentence the defendant will receive.

**6.** ***Withdrawal of Plea Not Permitted.*** The defendant understands that if the court accepts this plea agreement but imposes a sentence with which

the defendant does not agree, the defendant will not be permitted to withdraw this plea of guilty.

**7.** ***Payment of Special Assessment.*** The defendant understands that a mandatory special assessment of $100.00 per count of conviction will be entered against the defendant at the time of sentencing. The burden of establishing an inability to pay the required special assessment lies with the defendant.

**8.** ***Conditional Plea.*** If the Court consents, the defendant enters a conditional plea pursuant to Federal Rule of Criminal Procedure 11(a)(2) to allow for an appeal of the decision rendered by the Court (reflected in Document 20) in denying his motion to dismiss (reflected in Documents 13).

**9.** ***Waiver of Appeal and Collateral Attack.*** With the exception of the two issues raised and litigated in the defendant's Motion to Dismiss, which was denied by the Court, the defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, the defendant's conviction, or the components of the sentence to be imposed herein (including the length and conditions of supervised release, as well as any sentence imposed upon a revocation of supervised release). The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate by the court. The defendant also waives any right to

challenge a sentence or otherwise attempt to modify or change his sentence or manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001)], and a motion brought under Fed. Rule of Civ. Pro 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court. However, if the United States exercises its right to appeal the sentence imposed as authorized by Title 18, U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received as authorized by Title 18, U.S.C. § 3742(a). Not withstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct.

**10.** ***FOIA and Privacy Act Waiver.*** The defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, U.S.C. § 552 and the defendant waives any rights conferred under the Privacy Act of 1974, Title 5, U.S.C. § 552a to prevent or object to the disclosure of records or materials pertaining to this case.

**11.** ***Full Disclosure by United States.*** The defendant understands the United States will provide to the court and the United States Probation Office all information it deems relevant to determining the appropriate sentence in this case. This may include information concerning the background, character, and conduct of the defendant including the entirety of the defendant's criminal activities. The defendant understands these disclosures are not limited to the count to which the defendant has pled guilty. The United States may respond to comments made or positions taken by the defendant or defendant's counsel and to correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject only to any limitations set forth in this plea agreement. The defendant also has the right to provide information concerning the offense and to make recommendations to the court and the United States Probation Office.

**12.** ***Parties to the Agreement.*** The defendant understands this plea agreement binds only the defendant and the United States Attorney for the District of Kansas, and that it does not bind any other federal, state, or local prosecution authority.

**13.** ***No Other Agreements.*** The defendant has had sufficient time to discuss this case, the evidence, and this agreement with the defendant's attorney and defendant is fully satisfied with the advice and representation provided by defendant's counsel. Further, the defendant acknowledges that he has read the plea agreement, understands it and agrees it is true and

accurate and not the result of any threats, duress or coercion. The defendant further understands that this plea agreement supersedes any and all other agreements or negotiations between the parties, and that this agreement embodies each and every term of the agreement between the parties. The defendant acknowledges that the defendant is entering into this agreement and is pleading guilty because the defendant is guilty and is doing so freely and voluntarily.

/s/ Jason W. Hart Date: 11/13/13
Jason W. Hart
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, Kansas 67202
(316) 269-6481
Kan. Sup. Ct. No. 20276

/s/ Debra Barnett Date: 11/13/2013
Debra Barnett
Assistant U.S. Attorney
Criminal Coordinator, Wichita

/s/ Lester Ray Nichols Date: 11-13-13
Lester Ray Nichols
Defendant

/s/ Tim Henry Date: 11-13-13
Tim Henry
Assistant Federal Public
Defender
301 N. Main, Suite 850
Wichita, Kansas 67202
Attorney for Defendant

**United States District Court**
**District of Kansas**

| | |
|---|---|
| UNITED STATES OF AMERICA | **JUDGMENT IN A CRIMINAL CASE** |
| v. | Case Number: 6:13CR10106 – 001 |
| Lester Ray Nichols | USM Number: 09657-031 |
| | Defendant's Attorney: Timothy J. Henry |

**THE DEFENDANT:**

☒ pleaded guilty to count(s): 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 2250(a) | FAILURE TO REGISTER OR UPDATE A REGISTRATION, a Class C Felony | 11/09/2012 | 1 |

The defendant is sentenced as provided in pages 1 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☐ Count(s) ___ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

02/12/2014
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J Thomas Marten,
U.S. District Judge
Name & Title of Judge

February 13, 2014
Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 10 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

At the request of defense counsel, the Court recommends that the defendant be designated to an institution in Texas in order to facilitate visitation with his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at ____ on ____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

☐ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a mental health treatment program and/or sex offender treatment program. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, which may include plethysmograph, polygraph, and visual reaction testing as approved by the Probation Office to assess the defendant's risk level and determine if the defendant is in compliance with the conditions of supervision. The

defendant shall contribute to the cost based on the ability to pay.

2. The defendant shall refrain from any unsupervised contact with minors during the term of supervision unless approved by the U.S. Probation Officer.

3. The defendant shall neither possess nor have under his/her control any material that depicts sexually explicit conduct involving adults or minor[s], child pornography, or visual depictions of minor[s] engaged in sexually explicit conduct, all as defined in 18 U.S.C. 2256.

4. As directed by the U.S. Probation Officer, the defendant shall cooperate with and abide by the policies of the United States Probation Office's Computer and Internet Monitoring Program which includes restrictions and/or prohibitions related to: computer and Internet usage, possession and use of electronic, cellular, gaming, and Internet appliance devices; possession and use of computer hardware and software, encryption hardware or software, and accessing certain types of web sites to include: social networking, chat rooms, and those depicting sexually explicit conduct or pornographic material. The defendant will also be subject to computer monitoring, and will provide the United States Probation Office with a complete inventory of all electronic and Internet capable devices, user account information as well as password(s).

5. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the

defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

6. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals: | $ 100 | None | None |

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However,

pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| Totals: | $ | $ | |

☐ Restitution amount ordered pursuant to plea agreement $ __

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

  ☐ The interest requirement for the [] fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ ____ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, or ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years, to commence _ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to the Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

| Case Number (including Defendant Number) | Defendant Name | Joint and Several Amount |
|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payments against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main. Wichita, Kansas 67202

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | Case No. 13-10106-01 JTM |
| v. | ) | |
| LESTER RAY NICHOLS, Defendant. | ) | |

**NOTICE OF APPEAL**

(Filed Feb. 25, 2014)

NOTICE is hereby given that the above-named defendant, Lester Ray Nichols, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the judgment imposed on the 12th day of February, 2014, filed with the Court on the 13th day of February, 2014, and entered on the docket the 13th day of February, 2014.

Respectfully submitted,

s/Timothy J. Henry
TIMOTHY J. HENRY
KS Sup. Ct. No. 12934
Assistant Federal Public Defender
Federal Public Defender Office
301 N. Main, Suite 850
Wichita, KS 67202
Telephone: (316) 269-6445
Fax: (316) 269-6175
E-mail: tim_henry@fd.org

**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2014, I electronically filed the foregoing NOTICE OF APPEAL with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

Jason W. Hart
Assistant U.S. Attorney
301 N. Main, Suite 1200
Wichita, KS 67202

One copy sent U.S. Mail to:

Lester Ray Nichols
Reg. No. 09657-031
c/o CCA Leavenworth
100 Highway Terrace
Leavenworth, KS 66048

s/Timothy J. Henry
TIMOTHY J. HENRY
KS Sup. Ct. No. 12934
Assistant Federal Public Defender
Federal Public Defender Office
301 N. Main, Suite 850
Wichita, KS 67202
Telephone: (316) 269-6445
Fax: (316) 269-6175
E-mail: tim_henry@fd.org

(NOTE: Identify Changes with Asterisks (*))

**United States District Court**
**District of Kansas**

UNITED STATES OF AMERICA

v.

Lester Ray Nichols

**AMENDED JUDGMENT IN A CRIMINAL CASE**

(Filed Jul. 29, 2014)

Case Number: 6:13CR10106 – 001

USM Number: 09657-031

Defendant's Attorney: Timothy J. Henry

**Date of Original Judgment:** 02/12/14
(Or Date of Last Amended Judgment)

**Reason for Amendment:**

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reason (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the

Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Direct Motion to District Court Pursuant
☐ 28 U.S.C. § 2255 or
☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

**THE DEFENDANT:**

☒ pleaded guilty to count(s): 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| Title & Section | Nature of Offense | Offense Ended | Count |
|---|---|---|---|
| 18 U.S.C. § 2250(a) | FAILURE TO REGISTER OR UPDATE A REGISTRATION, a Class C Felony | 11/09/2012 | 1 |

The defendant is sentenced as provided in pages 1 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☐ Count(s) __ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

*07/29/2014
Date of Imposition of Judgment

s/ J. Thomas Marten
Signature of Judge

Honorable J Thomas Marten,
Chief U.S. District Judge
Name & Title of Judge

July 29, 2014
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 10 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

At the request of defense counsel, the Court recommends that the defendant be designated to an institution in Texas in order to facilitate visitation with his family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ on ____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ____ on ____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check if applicable)*

☒ The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check if applicable)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*

*☒ The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such

jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all changes in the information required. *(Check if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check if applicable)*

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall successfully participate in a mental health treatment program and/or sex offender treatment program. The defendant shall abide by all program rules, requirements, and conditions of the sex offender treatment program, which may include plethysmograph, polygraph, and visual reaction testing as approved by the Probation Office to assess the defendant's risk level and determine if the defendant is in compliance with the conditions of supervision. The defendant shall contribute to the cost based on the ability to pay.

2. The defendant shall refrain from any unsupervised contact with minors during the term of supervision unless approved by the U.S. Probation Officer.

3. The defendant shall neither possess nor have under his/her control any material that depicts sexually explicit conduct involving adults or minor[s], child pornography, or visual depictions of minor[s] engaged in sexually explicit conduct, all as defined in 18 U.S.C. 2256.

4. As directed by the U.S. Probation Officer, the defendant shall cooperate with and abide by the policies of the United States Probation Office's Computer and Internet Monitoring Program which includes restrictions and/or prohibitions related to: computer and Internet usage, possession and use of electronic, cellular, gaming, and Internet appliance devices; possession and use of computer hardware and software, encryption hardware or software, and accessing certain types of web sites to include: social networking, chat rooms, and those depicting sexually explicit conduct or pornographic material. The defendant will also be subject to computer monitoring, and will provide the United States Probation Office with a complete inventory of all electronic and Internet capable devices, user account information as well as password(s).

5. The defendant shall submit his/her person, house, residence, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that

the premises may be subject to searches pursuant to this condition.

6. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals: | $ 100 | None | None |

☐ The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| Name of Payee | Total Loss* | Restitution Ordered | Priority or Percentage |
|---|---|---|---|
| Totals: | $ | $ | |

☐ Restitution amount ordered pursuant to plea agreement $ __

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

  ☐ The interest requirement for the [ ] fine and/or ☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ ___ due immediately, balance due

☐ not later than _____ , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of __ years, to commence __ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to the Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

| Case Number (including Defendant Number) | Defendant Name | Joint and Several Amount |
|---|---|---|

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States. Payment against any money judgment ordered as part of a forfeiture order should be made payable to the United States of America, c/o United States Attorney, Attn: Asset Forfeiture Unit, 1200 Epic Center, 301 N. Main. Wichita, Kansas 67202

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>LESTER RAY NICHOLS,<br>Defendant-Appellant. | No. 14-3041 |

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**Appeal from the United States District Court for the District of Kansas (D.C. No. 6:13-CR-10106-JTM-1)**

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(Filed Dec. 30, 2014)

Timothy J. Henry, Assistant Public Defender (Melody Brannon Evans, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Wichita, Kansas, for Appellant.

James A. Brown, Assistant United States Attorney (Barry R. Grissom, United States Attorney, with him on the brief), Office of the United States Attorney, Topeka, Kansas, for Appellee.

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Before **McHUGH, McKAY,** and **BALDOCK,** Circuit Judges.

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**McHUGH,** Circuit Judge.

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## I. INTRODUCTION

Lester Nichols is a convicted sex offender who left the United States without updating his status on the federal sex offender registry. He was brought back to the United States and charged with failing to register, in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). On appeal, he challenges his conviction based on two theories: (1) SORNA's updating requirement does not apply in situations like his where the sex offender moves from a SORNA jurisdiction to a non-SORNA jurisdiction, and (2) SORNA's delegation of authority to the Attorney General to determine SORNA's retroactive application is unconstitutional. We reject both arguments and therefore affirm Mr. Nichols's conviction.

## II. BACKGROUND

In 2003, Mr. Nichols was convicted of traveling interstate with the intent to engage in sex with a minor, in violation of 18 U.S.C. § 2423(b). He was sentenced to 120 months imprisonment. Although Mr. Nichols's conviction occurred before SORNA's 2006 enactment, the U.S. Attorney General issued a rule in 2007 extending the requirements of SORNA "to all sex offenders, including sex offenders convicted of the

offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. This rule was issued pursuant to the authority Congress delegated to the Attorney General under SORNA. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter. . . ."). Mr. Nichols, as a preenactment sex offender, is thus required to comply with SORNA's registration requirements.

By 2012, Mr. Nichols had been released from prison and was placed under federal supervision in the District of Kansas. Up until that time, he had complied with both the Kansas and SORNA sex offender registration requirements. In November 2012, Mr. Nichols took a plane from Kansas City to Manila, Philippines, without updating his sex offender registry. One month later, he was arrested by Philippine law enforcement officers and was turned over to State Department custody for deportation to the United States. Mr. Nichols was charged with and indicted for one count of failure to update a registration as required by SORNA. *See* 18 U.S.C. § 2250(a).

Mr. Nichols moved to dismiss the indictment. He argued before the district court that SORNA did not require him to register as a sex offender while he was in the Philippines because, once in the Philippines, he did not reside in a U.S. jurisdiction. Mr. Nichols also contended SORNA's delegation of authority to the Attorney General to determine SORNA's application

to preenactment sex offenders like him is unconstitutional.

The district court rejected Mr. Nichols's first argument in light of *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), where we held that a defendant violated SORNA when he moved from Utah to Belize without updating his status on the sex offender registry. The district court also rejected Mr. Nichols's nondelegation argument. The court acknowledged the lack of binding Tenth Circuit precedent addressing this issue, but noted our observation in dicta that SORNA's registration provision does not violate the nondelegation doctrine. *United States v. Carel*, 668 F.3d 1211, 1214 (10th Cir. 2011). The district court also looked to *United States v. Rickett*, 535 F. App'x 668 (10th Cir. 2013) (unpublished), wherein we rejected a nondelegation argument under plain error review because, absent controlling precedent, application of SORNA to a preenactment offender was not plainly unconstitutional. Finally, the district court explained that the clear weight of authority from other circuits has rejected nondelegation challenges to 42 U.S.C. § 16913(d). Accordingly, the district court ruled SORNA's delegation of authority under § 16913(d) is not unconstitutional and denied Mr. Nichols's motion to dismiss. Mr. Nichols thereafter entered a conditional guilty plea, reserving the right to appeal both issues. He now does so and we exercise our jurisdiction under 28 U.S.C. § 1291.

## III. DISCUSSION

Mr. Nichols appeals both elements of the district court ruling. He first contends SORNA's requirement that an offender keep his registration current does not apply to offenders who change their residence to a non-SORNA jurisdiction. In so arguing, he asks us to overturn our precedent in *United States v. Murphy*, wherein we held, "a sex offender, upon changing his residence, [must] update his registration in a jurisdiction involved . . . even if he did not establish a new residence in a SORNA jurisdiction." 664 F.3d 798, 803 (10th Cir. 2011). Mr. Nichols alternatively argues we should vacate his conviction on the basis that 42 U.S.C. § 16913(d) creates an unconstitutional delegation of authority by permitting the Attorney General to determine SORNA's application to preenactment sex offenders. These issues "involve statutory interpretations of and constitutional challenges to SORNA," which we review de novo, "interpreting the words of the statute in light of the purposes Congress sought to serve." *United States v. Hinckley*, 550 F.3d 926, 928 (10th Cir. 2008) (brackets and internal quotation marks omitted), *abrogated on other grounds by Reynolds v. Unites* [sic] *States*, 132 S. Ct. 975 (2012).

### *A. Extraterritorial Changes of Residence under SORNA*

SORNA requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42

U.S.C. § 16913(a). SORNA defines "jurisdiction" as including U.S. states, territories, and Indian reservations, but not foreign nations. *Id.* § 16911(10). It defines "resides" as "the location of the individual's home or other place where the individual habitually lives." *Id.* § 16911(13). When a sex offender has a change of residence, he "keep[s] the registration current" by "not later than 3 business days after each change of . . . residence . . . appear[ing] in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform[ing] that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id.* § 16913(c). In regard to his residence, the sex offender must provide for the registry "[t]he address of each residence at which the sex offender resides or will reside." *Id.* § 16914(a)(3). Mr. Nichols argues the plain language of these SORNA provisions indicates that the requirement to "keep the registration current" does not apply to sex offenders who have a change of residence to a non-SORNA jurisdiction.

We squarely addressed this issue in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). The defendant in *Murphy* was a registered sex offender who had resided in a correctional facility in Utah, departed from Utah by bus, arrived in California, then took a taxi to Mexico, and ultimately ended up in Belize where he lived for six months. *Id.* at 799-800. Mr. Murphy was deported to the United States and was charged with and convicted of failing to update his sex offender registry, in violation of 18 U.S.C.

§2250(a). *Id.* at 800. On appeal, Mr. Murphy challenged his conviction on the basis that he had no obligation to update his registration after he left a SORNA jurisdiction for a non-SORNA jurisdiction. *Id.*

We affirmed Mr. Murphy's conviction, interpreting SORNA otherwise. We interpreted the phrase "jurisdiction where the offender resides" from § 16913(a) and term "residence" as used in § 16913(c) as two different concepts – the former meaning "the state where the individual keeps his home or habitually lives" and the latter meaning "a specific dwelling place . . . where an offender habitually lives." *Id.* at 800-801. And we concluded the two terms trigger different obligations: "the offender's jurisdiction is where he must keep his registration current, while the offender's residence is a specific piece of registry information, a change of which sparks a reporting duty." *Id.* at 801.

From this interpretation, we drew three conclusions. First, "abandoning one's living place constitutes a change in residence under SORNA." *Id.* Second, "[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved." *Id.* at 803. And third, "a reporting obligation does not disappear simply because an individual manages to relocate to a non-SORNA jurisdiction before the three-day deadline for updating a registration has passed." *Id.* Applying this interpretation to Mr. Murphy's case, we ruled, "a legal obligation to update his registration attached" when Mr. Murphy left the correctional

facility "while he was still in Utah, and not when he arrived in Belize." *Id.* at 804. And even though Mr. Murphy "was no longer living in Utah when his failure to register became punishable" (i.e., three days after his change of residence), "Utah remained a 'jurisdiction involved' under SORNA because it was his current jurisdiction when the reporting obligation arose." *Id.* We therefore affirmed his conviction for failure to register under § 2250(a).

Earlier this year we reaffirmed *Murphy*'s interpretation of SORNA. *United States v. Lewis*, 768 F.3d 1086, 1091-92 (10th Cir. 2014). We explained in *Lewis* that "*Murphy*'s logic [is] controlling" and concluded, "The effect of *Murphy*'s holding is that the abandonment of a permanent residence triggers a sex offender's obligation to update his registration" and "the departure district remains a 'jurisdiction involved' even after the sex offender has left the state." *Id.*

Mr. Nichols contends that *Murphy* misinterpreted SORNA and we should therefore overturn it. In so arguing, Mr. Nichols relies primarily on three sources: (1) Judge Lucero's dissenting opinion in *Murphy*, 664 F. 3d at 806, which asserted that the majority "impermissibly rejects the statutory definition of 'resides'. . . . [and] avoids a plain text reading of the statute by giving two different meanings to the defined term 'resides'"; (2) the Eighth Circuit's opinion in *United States v. Lunsford*, 725 F.3d 859, 862 (8th Cir. 2013), which disagreed with *Murphy*'s interpretation of SORNA; and (3) the U.S. Supreme Court's decision in *Carr v. United States*, 560 U.S. 438, 447-49

(2010), which looked to the plain language of § 2250 and concluded Congress's use of present tense verbs "strongly supports a forward-looking construction" and therefore the elements of § 2250 must be met sequentially for a violation to occur.

Regardless of the merits of these arguments, we are bound by the majority opinion in *Murphy*. Indeed, one panel of this court cannot overrule the judgment of another panel "absent en banc consideration . . . [or] an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." *United States v. Brooks*, 751 F.3d 1204, 1209 (10th Cir. 2014) (internal quotation marks omitted). Neither exception to our horizontal stare decisis rule is present here. Mr. Nichols attempts to characterize *Carr* as the type of contrary Supreme Court authority that would invalidate *Murphy*. But *Carr* was decided before *Murphy* and is therefore not an intervening decision. And although Mr. Nichols correctly notes that *Murphy* did not address the Supreme Court's *Carr* decision, our later *Lewis* decision did, ruling that *Carr* "does not dictate an alternative conclusion" to the conclusion reached in *Murphy*. 768 F.3d at 1091 n.4. *Murphy* is therefore controlling.

Applying *Murphy*'s interpretation of SORNA to this case, we affirm Mr. Nichols's conviction under § 2250(a). By boarding the plane to the Philippines, Mr. Nichols abandoned his residence in Kansas – a "jurisdiction involved." This change in residence triggered a registry obligation in Kansas, which Mr. Nichols did not fulfill. Mr. Nichols therefore violated

§ 2250(a) by failing to update his registry in Kansas within three days of his change in residence.

### *B. Delegation under SORNA*

Mr. Nichols alternatively argues we should vacate his SORNA conviction on the basis that SORNA's delegation of authority to the Attorney General to determine SORNA's preenactment application, 42 U.S.C. § 16913(d), is unconstitutional. Mr. Nichols insists that in applying the nondelegation doctrine to this case, we should apply a heightened "meaningful constraint" standard, instead of the more lenient "intelligible principles" standard, because Congress delegated authority under SORNA that relates to the imposition of criminal liability. We disagree both as to the relevant legal standard and the application of that standard and conclude that § 16913(d) does not violate the nondelegation doctrine.

#### 1. The Nondelegation Doctrine

Under the U.S. Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST., art. I, § 1. From this language and based on separation of powers principles, the Supreme Court "has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government." *Touby v. United States*, 500 U.S. 160, 165 (1991). Nonetheless, Congress may

delegate authority to a different branch, and "[s]o long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (brackets and internal quotation marks omitted). The Supreme Court has further explained that an intelligible principle exists so long as "Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority." *Id.* at 372-73.[1]

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[1] Under this standard, the Supreme Court has struck down statutes delegating power to an administrative agency on only two occasions, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). *Panama Refining Co.* and *Schechter Poultry* constitute the "outer limits" of the Supreme Court's nondelegation precedent and demonstrate the Court's reticence "to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.* at 474-75 (internal quotation marks omitted); *see also United States v. Rickett*, 535 F. App'x 668, 675 (10th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1529 (2014) ("[T]he Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining;* so the doctrine, even if dead, has never received a proper burial.").

### 2. Delegation under 42 U.S.C. § 16913(d)

Applying this standard to SORNA, we concluded that § 16913(d) does not violate the nondelegation doctrine. The language of SORNA demonstrates, first, that Congress clearly delineated the general policy upon which SORNA is based. Section 16901 expresses the congressional policy embodied in SORNA: "to protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." This policy statement conveys the intelligible principles upon which the Attorney General's delegated authority must be based. *See United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013) (concluding that SORNA's broad policy statement contained in § 16901 is "sufficient to provide an intelligible principle for delegation"); *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir. 2013) (explaining that § 16901 "provides sufficient guidance to the Attorney General").

Second, Congress clearly delineated "the public agency which is to apply" the authority by specifying the Attorney General as the executive official to whom it delegated authority under SORNA.

Third, Congress also clearly delineated the boundaries of the authority it delegated to the Attorney General. Section 16913(d) delegates to the Attorney General a single, narrow decision: to determine SORNA's application to preenactment sex offenders. Under this delegation, "the Attorney General cannot

do much more than simply determine whether or not SORNA applies to those individuals." *United States v. Guzman*, 591 F.3d 83, 93 (2nd Cir. 2010). This circumscribed question is further "constrained by the legislative determinations that Congress made in other sections of SORNA," including the provisions pronouncing which crimes are subject to SORNA, § 16911, where the offender must register, § 16913(a), the timeframe within which the offender must register, § 16913(b), the method of registration, § 16913(b) – (c), and the information the offender must include in the registry, § 16914(a). *United States v. Cooper*, 750 F.3d 263, 272 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014). Congress also explicitly outlined the elements of the failure-to-register crime in § 2250. The authority Congress delegated under § 16913(d) is therefore bounded by the limited nature of the retroactive determination itself and the guidance Congress provided in other SORNA provisions.

Accordingly, we hold that § 16913(d) meets the Supreme Court's intelligible principles test because Congress clearly delineated SORNA's general policy, the public agency to which Congress delegated its authority, and the boundaries of this delegation. *See Mistretta*, 488 U.S. 372-73.

Mr. Nichols asserts, however, that we should apply the more rigorous "meaningfully constrains" standard instead of the "intelligible principle" standard because § 16913(d) delegates Congress's authority to regulate a statute with criminal consequences. In so arguing, Mr. Nichols relies on *Touby v. United*

*States*, in which the Supreme Court acknowledged the possibility that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but declined to resolve the issue because, even under a more stringent standard, the provision at issue in *Touby* "meaningfully constrains the Attorney General's discretion to define criminal conduct." 500 U.S. 160, 165-66 (1991). Mr. Nichols contends that this case is the appropriate vehicle to institute the more searching "meaningfully constrains" standard, and that § 16913(d) fails under that standard.

The Third Circuit recently confronted this issue in *Cooper*, 750 F.3d at 270-71. The *Cooper* court recognized the Supreme Court left open the question whether a heightened "meaningfully constrains" standard applies to Congress's delegation of authority involving statutes with criminal implications. *Id.* at 271. But as the Third Circuit further explained, the meaningful constraints standard "has been referenced in only a handful of cases, none of which set forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies the standard." *Id.* The Third Circuit therefore refused to invoke the meaningfully constrains standard "[u]ntil the Supreme Court gives us clear guidance to the contrary." *Id.*

We likewise decline to abandon the well-settled "intelligible principle" standard for the undeveloped "meaningfully constrains" standard. And because

Congress provided an intelligible principle to which the Attorney General must conform in exercising the authority delegated under § 16913(d), we join our sister circuits[2] in concluding that § 16913(d) does not violate the nondelegation doctrine.[3]

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[2] *United States v. Cooper*, 750 F.3d 263, 271-72 (3d Cir.), *cert. denied*, 135 S. Ct. 209 (2014); *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014); *United States v. Sampsell*, 541 F. App'x 258, 259-60 (4th Cir. 2013) (unpublished) (per curiam); *United States v. Goodwin*, 717 F.3d 511, 516-17 (7th Cir. 2013); *United States v. Kuehl*, 706 F.3d 917, 919-20 (8th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman*, 591 F.3d 83, 92-93 (2nd Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 263-64 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009).

[3] We acknowledge the concern some federal judges have expressed with Congress's delegation of such an important question. *See Reynolds v. United States*, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (opining that § 16913(d)'s delegation of authority to the Attorney General "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable"); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (applying principles of constitutional avoidance to prevent an interpretation that would allow the Attorney General to choose "willy nilly" between either of "two extremes" or anything in between in determining SORNA's application to preenactment offenders). Although we agree that Congress's delegation of this important decision is puzzling, *see Cooper*, 750 F.3d at 272, we conclude that it nonetheless passes constitutional muster.

## IV. CONCLUSION

For these reasons, we AFFIRM Mr. Nichols's conviction for failure to register in violation of 18 U.S.C. § 2250(a).

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14-3041, *United States v. Nichols*

**McKAY**, Circuit Judge, concurring.

I concur with the panel's opinion with regard to the nondelegation doctrine question. I also concur that, under these facts, our decision in *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011), binds us with regard to the application of SORNA, and compels this court to determine that Kansas remained a "jurisdiction involved" under the Act even after Mr. Nichols abandoned his residence there. I write separately to express disagreement with the majority in *Murphy*, agreement with the dissent in *Murphy* by Judge Lucero, and my belief that consideration of this case by the full en banc court would be appropriate.

Judge Lucero's interpretation of SORNA's registration requirements accords with that of the Eighth Circuit in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013). *Lunsford* held that an individual who abandons a residence in a jurisdiction covered by SORNA to move to a jurisdiction not covered by SORNA no longer resides in a "jurisdiction involved" under the Act and therefore has no obligation to register. *Id.* at 861. I am persuaded by this reading of

SORNA's plain language, however, the majority opinion in *Murphy* currently controls this case, and I accordingly concur.

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>LESTER RAY NICHOLS,<br>Defendant-Appellant. | No. 14-3042 |

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**ORDER**

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(Filed Apr. 15, 2015)

Before **BRISCOE**, Chief Judge, **KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH, PHILLIPS, MCHUGH,** and **MORITZ**, Circuit Judges.

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This matter is before the court on the appellant's *Petition for Rehearing En Banc.* We also have a response from the government. Upon consideration of the implicit request for panel rehearing contained in the petition, the request is denied by a majority of the original panel members.

The en banc petition was also transmitted to all of the judges of the court who are in regular active service. Upon review, a poll was called, and a majority of the active judges voted to deny the en banc suggestion. Consequently, that request is likewise denied. Judges Lucero, Gorsuch, Matheson and Moritz would grant the en banc petition.

Judges Lucero and Gorsuch have written separately in dissent from the denial of the petition.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

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**14-3041, United States v. Nichols (Lucero, J., dissenting from the denial of rehearing en banc)**

I dissent from the denial of rehearing en banc because a recent Eighth Circuit decision creates a circuit split regarding the applicability of SORNA's notice provisions to offenders who leave the country. *Compare United States v. Lunsford*, 725 F.3d 859, 860 (8th Cir. 2013), *with United States v. Murphy*, 664 F.3d 798, 799 (10th Cir. 2011). I continue to hold the view that *Murphy* was incorrectly decided for the reasons stated in my dissent from that case. *See id.* at 804-08 (Lucero, J., dissenting). Correcting this circuit split is a matter of exceptional importance given the

express purpose of Congress in enacting SORNA to remedy "a wide disparity among State registration requirements and notification obligations for sex offenders." H.R. Rep. No. 109-218(I), at 23 (2005).

The facts of *Lunsford* and this case illustrate why our current jurisprudence runs directly against the stated intent of Congress. In both cases, the appellants moved directly from the Kansas City metropolitan area to the Philippines. Lunsford had lived in the Missouri side of the metropolis and was not required to update his Missouri registration to reflect his move out of the country. *Lunsford*, 725 F.3d at 860. But Nichols, who had lived just across the river in Kansas, was brought back to the United States and sentenced to prison for failing to update his Kansas registration. *United States v. Nichols*, 775 F.3d 1225, 1227 (10th Cir. 2014). We have simply replaced a "wide disparity among State registration requirements" with a wide disparity among Circuit registration requirements. In doing so, we thwart the intent of Congress and needlessly complicate an already complicated law.

Additionally, I agree with Judge Gorsuch that the Constitution demands something more than an "intelligible principle" when Congress delegates its power to define crimes to the executive branch agency charged with prosecuting those crimes. Moreover, I agree that it is questionable whether SORNA even includes an "intelligible principle" to guide the Attorney General's discretion to apply SORNA's provisions

to pre-Act offenders. I would address this issue in en banc rehearing as well.

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No. 14-3041, *United States v. Nichols*

**GORSUCH**, Circuit Judge, dissenting from the denial of rehearing en banc.

A circuit split lingers here. First to approach the question, this circuit interpreted 42 U.S.C. § 16913 as requiring sex offenders to notify authorities if they plan to leave the country. *United States v. Murphy*, 664 F.3d 798, 801-02 (10th Cir. 2011). In a later opinion the Eighth Circuit gave thoughtful consideration to this interpretation of the statute but came to the opposite view. *United States v. Lunsford*, 725 F.3d 859, 861-82 (8th Cir. 2013); *see also Murphy*, 664 F.3d at 805 (Lucero, J., dissenting). In denying rehearing today to reconsider this court's position in light of *Lunsford*'s learning, we leave those who seek a resolution of the circuit split to travel other avenues. *Murphy* and *Lunsford* articulate both sides of the split admirably and there's no need for further amplification here, only resolution somewhere.

Beyond this matter of statutory interpretation, though, lies a constitutional question that deserves more notice. If the separation of powers means anything, it must mean that the prosecutor isn't allowed to define the crimes he gets to enforce. Yet, that's precisely the arrangement the Sex Offender Registration and Notification Act purports to allow in this

case and a great many more like it. In § 16913(d), Congress left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction. So unusual is this delegation of legislative authority that to find an analogue you might have to look back to the time Congress asked the President to devise a code of "fair competition" for the poultry business – a delegation of legislative authority the Supreme Court unanimously rejected and Justice Cardozo called "unconfined and vagrant," a "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 553 (1935) (Cardozo, J., concurring). Even then you could be excused for thinking the delegation before us a good deal less cooped or caged than that one. After all, it doesn't just grant some alphabet soup agency the power to write rules about the chicken trade. It invests in the nation's chief prosecutor the authority to devise a criminal code governing a half-million people.

When it comes to sex offenders convicted *after* SORNA's enactment, the statute is exquisitely detailed. It divides those persons into three tiers based on the seriousness of their offense. 42 U.S.C. § 16911. It specifies which sex offenses place offenders in which tiers. *Id.* It requires tier I offenders to register their location for 15 years; tier II offenders to do so for 25 years; and tier III offenders to carry on registering for life. *Id.* § 16915. It explains what conditions

merit reducing the registration period. *Id.* § 16915(b)(1). On and on it goes for 22 pages.

But none of this automatically applies to Mr. Lester Nichols and others convicted of sex offenses *before* the Act's passage. Instead, when it comes to past offenders, the Act says just this:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for registration of any such sex offender. 42 U.S.C. § 16913(d).

Yes, that's it.

As the government acknowledges, this language leaves the Attorney General free to do nothing: the law "does not require the Attorney General to act within a certain time frame or by a date certain; it does not require him to act at all." Brief for the United States at 23-24, *Reynolds v. United States*, 132 S. Ct. 975 (2012) (No. 10-6549). Alternatively, "[u]nder his delegated authority in Subsection (d), the Attorney General could" require all past offenders to register or "require some but not all to register." *Id.* at 24-25. Or, alternatively still, he could require those forced to register to "comply with some but not all of the registration requirements" applicable to future offenders in order to adapt the law as he thinks best for past offenders. *Id.* After all, the statute grants the Attorney General authority to specify the

applicability not of the Act as a whole, one way or another, but to specify the applicability of each of the various "requirements" contained within the Act – and Congress well knew the difference. *Compare* 42 U.S.C. § 16912(b) (explaining that the Attorney General shall "interpret and implement this subchapter"), *with id.* § 16913(d) (providing the Attorney General authority "to specify the applicability of the requirements of this subchapter"). Even then, the Attorney General remains free to "change his mind at any given time or over the course of different administrations." Brief for the United States, *supra*, at 23-24. Given all this, it's perhaps unsurprising how many circuits and commentators have observed that the degree of discretion invested in the Attorney General here is vast.[1] It is so vast, in fact, that some

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[1] *See, e.g.*, *United States v. Rickett*, 535 F. App'x 668, 673 (10th Cir. 2013) ("As written, § 16913(d) gives the Attorney General discretion to decide whether and how SORNA should be applied retroactively."); *United States v. DeJarnette*, 741 F.3d 971, 981 (9th Cir. 2013) ("[W]e see no reason to assume that the Attorney General was mandated to apply *all* of SORNA's registration requirements to *all* pre-Act offenders."); *United States v. Johnson*, 632 F.3d 912, 923 (5th Cir. 2011) ("This language is not ambiguous. Following the plain meaning rule, this phrase delegates to the Attorney General the decision of whether and how the SORNA registration requirements apply to offenders with pre-enactment convictions."); *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) ("Subsection (d) granted the Attorney General unfettered discretion to determine both *how* and *whether* SORNA was to be retroactively applied."); *see also* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L. Rev. 483, 485 (2014); Reem Sadik,

(Continued on following page)

(including the government itself) once suggested a narrower interpretation of § 16913(d) would make more sense of the statute. *See id.*; *Reynolds*, 132 S. Ct. at 986 (Scalia, J., dissenting).

A majority of the Supreme Court, however, carefully considered and rejected any alternative reading and made plain that, as a matter of statutory interpretation, SORNA's retroactive application hinges on the Attorney General. The Court explained that Congress chose this course as its solution for the many "problems" associated with trying "to apply [SORNA's] registration requirements to pre-Act offenders" who were at the time subject to a "patchwork of preexisting state systems." *Reynolds*, 132 S. Ct. at 981. The power delegated to the Attorney General, the Court said, is sort of like a directive telling the Commissioner of Major League Baseball that he has "the authority to specify the applicability" of a stringent minor league drug testing policy to major league players: "we should think that the minor league policy would not apply unless and until the Commissioner so specified" whether and how it should be applied to meet the needs of a similar but different league. *Id.* As written, the statute demonstrates Congress thought that past offenders could "warrant[ ] different federal registration treatment" than future offenders. *Id.* Even among pre-Act offenders, the statute contemplates the possibility of "different federal

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Comment, *Passing the Torch but Sailing too Close to the Wind*, 6 Legis. & Pol'y Brief 295, 298 (2014).

registration treatment of different categories of pre-Act offenders." *Id.* In short, Congress thought it a "desirable solution" to ask "the Department of Justice . . . to examine these pre-Act offender problems" and specify "new registration requirements" for them. *Id.*

The Court acknowledged that a statute investing so much authority in the Attorney General inevitably raises with it separation of powers questions. But, the Court said, it would leave those questions for another day. *Id.* Justices Scalia and Ginsburg went further, expressing concern that the law "sail[s] close to the wind." *Id.* at 986 (Scalia, J., dissenting). The day to decide the constitutional question the Court left open is now upon us. And, as it turns out, the statute doesn't just sail close to the wind. It sails right into it.

Article I § 1 provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Many times over and in cases stretching back to the founding the Supreme Court has held that this language limits the ability of Congress to delegate its legislative power to the Executive. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001). There's ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty. As Madison put it, "[n]o political truth is . . . stamped with the authority of more enlightened patrons of liberty" than the separation of powers

because "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961). By separating the lawmaking and law enforcement functions, the framers sought to thwart the ability of an individual or group to exercise arbitrary or absolute power. And by restricting lawmaking to one branch and forcing any legislation to endure bicameralism and presentment, the framers sought to make the task of lawmaking more arduous still. These structural impediments to lawmaking were no bugs in the system but the point of the design: a deliberate and jealous effort to preserve room for individual liberty. *See, e.g.*, *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested power exists to protect liberty.").

Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow,

*Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1011-17, 1031 (2006).

So it is that "to abandon openly the nondelegation doctrine [would be] to abandon openly a substantial portion of the foundation of American representative government." Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 332 (2002). Neither is it so much that bureaucrats might do a "bad job as our effective legislators" as that "they are neither elected nor reelected, and are controlled only spasmodically by officials who are." John Hart Ely, *Democracy and Distrust* 131 (1980).[2]

Of course all this invites the question: how do you know an impermissible delegation of legislative authority when you see it? By its own telling, the

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[2] For other excellent works along these and related lines, see Philip Hamburger, *Is Administrative Law Unlawful?* 377 (2014); Bogdan Iancu, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism* 222 (2012); Martin Redish, *The Constitution as Political Structure* 16 (1995); David Schoenbrod, *Power Without Responsibility* 181 (1993); Ernest Gellhorn, *Returning to First Principles*, 36 Am. U. L. Rev. 345, 352 (1987); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines, 40 Law & Contemp. Probs.* 46, 49-65 (1976); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 822 (1999); Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1127-30 (1977); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, The Laws, and Delegations of Power*, 72 Nw. U. L. Rev. 443, 457 (1978); Nadine Strossen, *Delegation as a Threat to Liberty*, 20 Cardozo L. Rev. 861, 861 (1999).

Court has had a hard time devising a satisfying answer. *See, e.g.*, *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42 (1825) ("[T]he precise boundary of this power is a subject of delicate and difficult inquiry. . . ."). But the difficulty of the inquiry doesn't mean it isn't worth the effort. After all, at stake here isn't just the balance of power between the political branches who might be assumed capable of fighting it out among themselves. At stake is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution, a principle that may not be fully vindicated without the intervention of the courts. And "[a]bdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).[3]

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[3] *See also, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1237 (Alito, J., concurring) ("[T]he inherent difficulty of line-drawing is no excuse for not enforcing the Constitution."); *id.* at 1246 (Thomas, J., concurring in the judgment) (explaining that enforcing the separation of powers "is no less important for its difficulty"); Louis L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 Colum. L. Rev. 561, 577 (1947) ("[N]early every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine."); Antonin Scalia, *A Note on the Benzene Case*, Reg., July-Aug. 1980, at 25, 28 ("So even with all its Frankenstein-like warts, knobs, and (concededly) dangers, the unconstitutional delegation doctrine is worth hewing from the ice.").

Besides, putting the pieces together it turns out we do know a few things.

We know, for example, that Congress can leave "details" to the Executive. Congress can't punt to the President the job of devising a competition code for the chicken industry. *Schechter Poultry*, 295 U.S. at 531. Such widely applicable rules governing private conduct must be enacted by the Legislature. But once Congress enacts a detailed statutory scheme on its own – once it says, for example, that margarine manufacturers must pay a tax and place a stamp on their packages showing the tax has been paid – Congress may leave to the President "details" like designing an appropriate tax stamp. *In re Kollock*, 165 U.S. 526, 533 (1897); *see also, e.g., Currin v. Wallace*, 306 U.S. 1, 15 (1939); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

Of course, defining what qualifies as a detail is itself no detail. But whether or not something fairly denominated a detail is involved, we also know Congress may pass legislation the operation of which is conditioned on a factual finding by the President. So, for example, Congress may direct the President to lift a statutorily imposed trade embargo against Great Britain if he determines as a factual matter that it is no longer violating the United States's neutrality. *See Cargo of the Brig Aurora v. United States,* 11 U.S. 382, 388 (1813); *see also, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 692-93 (1892). That's clearly no trivial question the President may answer. But

answer it he may so long as a clear legislative consequence follows from his factual finding.

While these are the most traditional delegation tests – is it a detail? do we have a clear legislative consequence hinging on a factual finding? – in more recent times the Court has gone further, allowing legislation to stand so long as it contains an "intelligible principle" to guide the exercise of Executive discretion. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). How intelligible the "intelligible principle" must be to pass muster is much debated.[4] But we know, by way of example, that Congress may ask the EPA to set national air quality standards which are "requisite to protect the public health" subject to "an adequate margin of safety" because, as used in the statute, the term "requisite" demands a standard neither higher nor lower than necessary to meet the legislatively directed objective of protecting the public health with an adequate margin of safety. *Whitman*, 531 U.S. at 473, 476.

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[4] *See, e.g.*, *Ass'n of Am. Railroads*, 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment); *Mistretta v. United States*, 488 U.S. 361, 415-17 (1989) (Scalia, J., dissenting); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1224 (1985) ("Since the early part of this century, the Court has said in essence that a statute may be vague so long as it is either not too vague or no vaguer than necessary."); Lawson, *supra*, at 329 (asserting that the Court has "found intelligible principles where less discerning readers find gibberish"); *see also supra* n.2 (additional authorities discussing this question).

Still, the Court has never expressly held that an intelligible principle alone suffices to save a putative delegation when the criminal law is involved. *See Touby*, 500 U.S. at 165-66. To be sure, the Court has applied the intelligible principle test to regulations that may be enforceable through criminal penalties. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 695 n.10 (1997); *Yakus v. United States*, 321 U.S. 421, 424-25 (1944). But the Court hasn't endorsed the test in anything like the situation we face – legislation leaving it to the nation's top prosecutor to specify whether and how a federal criminal law should be applied to a class of a half-million individuals. In fact, the Court has repeatedly and long suggested that in the criminal context Congress must provide more "meaningful[ ]" guidance than an "intelligible principle." *Touby*, 500 U.S. at 166; *Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947); *see also, e.g., United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 140 n.7 (1959) (Black, J., dissenting); *cf. United States v. Grimaud*, 220 U.S. 506, 517 (1911); *United States v. Eaton*, 144 U.S. 677, 687-88 (1892).

It's easy enough to see why a stricter rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation – something quite different than holding someone liable for a money judgment because he turns out to be the lowest cost avoider. *See, e.g.*, Henry M. Hart, Jr., *The*

*Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 404 (1958); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 26 (1996). Indeed, the law routinely demands clearer legislative direction in the criminal context than it does in the civil and it would hardly be odd to think it might do the same here. *See, e.g.*, *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., statement respecting the denial of certiorari). When it comes to legislative delegations we've seen, too, that the framers' attention to the separation of powers was driven by a particular concern about individual liberty and even more especially by a fear of endowing one set of hands with the power to create and enforce criminal sanctions. And might not that concern take on special prominence today, in an age when federal law contains so many crimes – and so many created by executive regulation – that scholars no longer try to keep count and actually debate their number? *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991) (estimating that over 300,000 federal criminal regulations are on the books).

Recently, the Supreme Court has suggested what a more "meaningful" standard might look like in the criminal context. *See Touby*, 500 U.S. at 166-67. Its discussion came in the course of a challenge to the Controlled Substances Act – legislation permitting the Attorney General to schedule various drugs as controlled substances, rendering their possession by

unauthorized persons illegal. The Court allowed the law to stand, but instead of applying the intelligible principle test alone it proceeded to stress the presence and importance of certain specific statutory features. First, the Court explained, to schedule a drug as a controlled substance the Executive had to find that the drug posed an "imminent hazard" to public safety. *Id.* at 166. Second, when making that determination, the Court noted, the Executive had to consider the drug's "history and current pattern of abuse," "[t]he scope, duration, and significance of abuse," and "[w]hat, if any, risk there is to the public health." *Id.* Third, the law required a further factual finding that the drug in question "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States," and "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." *Id.* at 167.

Here we see strains of a more traditional delegation jurisprudence, one permitting Congress to enact rules the operation of which is premised on the Executive's factual findings. Indeed, distilling *Touby* to its essence, at least three "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule (unauthorized persons may not possess the drug) that (2) hinges on a factual determination by the Executive (does the drug pose an imminent hazard?) and (3) the statute provides criteria the Executive must employ when making its finding (does the drug in question currently have an accepted medical use?). These three criteria could easily be

applied to most any delegation challenge in the criminal context and provide the more meaningful standard the Court has long sought. In fact, since *Touby* a number of courts of appeals have employed something very much like them when assessing delegation challenges to federal criminal statutes. *See United States v. Amirnazmi*, 645 F.3d 564, 576-77 (3d Cir. 2011); *United States v. Dhafir*, 461 F.3d 211, 216-17 (2d Cir. 2006); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993).

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With that much guidance about delegation doctrine in hand, a few things come clear when we return to the statute before us. For one, it's easy enough to see the similarities between our case and *Schechter Poultry* where the Court held Article I violated. Here as there Congress pointed to a problem that needed fixing and more or less told the Executive to go forth and figure it out. Meanwhile, it's hard to see how ours might be likened to any of the cases turning away delegation challenges.

True, some might try to pass off the question of SORNA's applicability to past offenders as a mere "detail." But the statute before us leaves the Attorney General with "unfettered discretion to determine both *how* and *whether* SORNA [is] to be retroactively applied" to a half-million individuals under threat of criminal prosecution from his own deputies. *Madera*, 528 F.3d at 858. And however far you want to bend the boundaries of what qualifies as a "detail" it's hard

to see how that might qualify. Our case just isn't anything like your grandfather's tax stamp challenge.

Fair enough, some might respond, but sex offenders are so unpopular that there's little chance an Attorney General would do anything other than apply SORNA retroactively to the fullest extent possible. Maybe there is no legislative mandate – conditional or otherwise – requiring him to follow this course, but there might as well be. A reply along these lines seems a likely enough answer to the question what a politically attuned Attorney General would do when the hot potato is passed his way. But it also seems an unlikely answer to the question whether Congress may constitutionally pass the potato in the first place. After all, in a delegation challenge the question isn't whether the Executive is likely to exercise the delegation in one way or another but whether Congress is empowered to delegate the decision at all. *See Whitman*, 531 U.S. at 472-73 ("The very choice of which portion of the power to exercise . . . would *itself* be an exercise of the forbidden legislative authority."). Indeed, the logic at play here would serve to ensconce even the most extreme and obviously unconstitutional delegations only because of a judicial intuition about contemporary political pressures. And not only do unelected judges make for notoriously poor political pundits: ours is supposed to be an independent judiciary making decisions on the legal merits without respect to the vagaries of shifting political winds.

Others still might claim an "intelligible principle" can be rummaged out of SORNA's preamble – a provision that expresses Congress's wish to "protect the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders." 42 U.S.C. § 16901. But Supreme Court cases rejecting delegation challenges on intelligible principle grounds don't usually rest on policy objectives voiced in a statute's preamble. *See, e.g.*, *Panama Refining Co. v. Ryan*, 293 U.S. 388, 417-19 (1935) (finding a statute's general policy statement insufficient because the "general outline of policy contains nothing as to the circumstances or conditions in which" the delegation should be exercised, *id.* at 417). To be sure, the Court has sometimes gone so far as to suggest that Congress need only "clearly delineate[] the general policy" to guide an agency's conduct. *Mistretta*, 488 U.S. at 372-73. But this language usually seems to cover situations in which the legislative grant of discretion is tied to specific statutory provisions that expressly direct the exercise of that discretion. *See, e.g.*, *id.* at 375-76 (containing a direct link between discretion and direction); *Yakus*, 321 U.S. at 420-21 (same). Even in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), perhaps one of the most ambitious uses of the intelligible principle test, the Court interpreted the statute granting the Executive discretion to regulate radio in the "public interest" as requiring him to exercise that discretion in ways that "encourage the larger and more effective use of radio." *Id.* at 216. Meanwhile, no comparable guidance exists

here for § 16913(d) "specifie[s] no governing standard whatsoever." Calabresi & Lawson, *supra* n.1, at 485.

Requiring a direct statutory link between discretion and direction makes sense too. After all, as the Court has acknowledged in recent years, it is most assuredly wrong to assume that "whatever" seems to further a "statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis omitted). Legislation is the art of compromise and few (if any) statutes pursue a single preambulatory purpose without condition, subtlety, or exception. *Id.* at 525-26; *see also United States v. Rentz*, 777 F.3d 1105, 1113 (10th Cir. 2015) (en banc); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 104 (2006). For precisely these reasons, when it comes to the business of statutory interpretation it is usually the more specific and not the more general or aspirational direction that controls. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

Our case illustrates the point. SORNA's prefatory provision expressing the desire to protect children and create a nationwide registration requirement hardly establishes that the statute meant to do so always and in every particular without exception or at any cost. In fact, SORNA is replete with examples of compromise even when it comes to future offenders. Congress indicated that some future offenders may be exempt from its registration requirements if they committed certain kinds of sex offenses but not others. 42 U.S.C. § 16911(5)(C), (7)(A), (7)(B), (8).

Registration is required for life for some offenders but lesser periods for others. *Id.* § 16915(a). These periods can be reduced on good behavior. *Id.* § 16915(b)(1). In these circumstances, it would seem strange to suppose that the statute's prefatory statement of purpose – or, for that matter, provisions of the law discussing the treatment of future offenders – provides intelligible guidance for the Attorney General's treatment of past offenders. Especially when Congress went on to address past offenders specifically, exempted them from the automatic application of any of the statute's registration requirements, and left their treatment to the Attorney General.

Separately but relatedly, the Supreme Court has instructed that under the intelligible principle test "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman*, 531 U.S. at 475. Faint echos of detail doctrine can be found here: less direction may be required when Congress leaves it to the Executive to define what constitutes a "country elevator[ ]" and more may be required when Congress seeks to endow the Executive with the power to create regulations that affect the national economy. *Id.* So even assuming that a preamble detached from the provision granting discretion to the Executive might suffice to supply an intelligible principle in some circumstances, it certainly won't always. And once again it's hard to see how the discretion conferred here is anything less than extraordinary – in its breadth (allowing the Attorney General to apply

none, some, or all of SORNA's requirements to none, some, or all past offenders), in its subject matter (effectively defining a new crime), in its chosen delegate (the nation's top prosecutor), and in the number of people affected (half a million). All factors suggesting more, not less, guidance is required.

Neither is it any answer to say that, though the Attorney General wants for any intelligible principle to guide him in deciding which requirements to impose on which past offenders, at least his discretion finds some boundaries in the statute (he cannot exceed the full application of all of SORNA's requirements). Delegation doctrine teaches that Congress must set *both* the "boundaries" of the Executive's discretion *and* supply an "intelligible principle" for the exercise of that discretion within those boundaries. *Mistretta*, 488 U.S. at 372-73. After all and again, the point of the delegation doctrine isn't so much that some poor Executive agent tasked with the thankless job will necessarily perform poorly within the bounds and metes of the discretion set for him. It is that decoupling the exercise of his discretion so much from legislative direction deprives the people of the structural protections guaranteed by the first section of the first article of the Constitution.

There remains much less room still for debate about the proper outcome of this case when the "intelligible principle" test gives way to a more "meaningful" one in the criminal setting. After all, SORNA's delegation contains none of the three factors that *Touby* found reassuring and that circuit courts have

since used to assess delegation challenges in the criminal context. First, the statute provides no generally applicable rule for past offenders for the Attorney General to follow contingent only on specified factual findings. Rather, the Attorney General may apply all, some or none of the requirements of the Act however he sees fit. Second, the statute requires no factual findings of the Attorney General of any kind. Third, it offers no guidance about these non-existent factual findings.

To be sure, Congress could have easily written a statute with such constraints, and to remedy the delegation problem here it might still. For example, Congress could have tasked the Attorney General with the job of determining what factors correlate with recidivism or present an unreasonable danger to the public and make his determinations based on those considerations. When deciding which past offenders should be required to register Congress could have required the Attorney General to examine, as well, factors like the recency of the violation; the nature of the sex offense; the number of past violations; the offender's age, family, residential, or occupational circumstances; or the offender's mental or physical health – or banned consideration of any of these factors. It's easy to imagine all sorts of ways Congress might have constrained – and might still constrain – the Attorney General's discretion in ways parallel to *Touby*. But and by the government's own admission, we have nothing of the kind here. And that leaves us well outside the ballpark when it

comes to satisfying *Touby*'s test. Indeed, you might wonder if we are even on Yawkey Way. *See* Sadik, *supra* n.1, at 298 (arguing that SORNA fails *Touby*'s test).

Delegation doctrine may not be the easiest to tease out and it has been some time since the Court has held a statute to cross the line. But it has also been some time since the courts have encountered a statute like this one – one that, if allowed to stand, would require the Judiciary to endorse the notion that Congress may effectively pass off to the prosecutor the job of defining the very crime he is responsible for enforcing. By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.

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136 S.Ct. 445
Supreme Court of the United States

Lester Ray NICHOLS, petitioner,

v.

UNITED STATES.

No. 15-5238. | Nov. 6, 2015.

Case below, 775 F.3d 1225.

## Opinion

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit granted limited to Question 1 presented by the petition.